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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GILBERT ALBERT CHAVEZ, Defendant and Appellant.	F061361 (Tulare Sup. Ct. No. VCF226198) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. James W. Hollman, Judge.

J. Peter Axelrod, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, David A. Rhodes and Paul A. Bernardino, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Gilbert Albert Chavez was charged and convicted of count I, assault with intent to commit rape during a first degree burglary (Pen. Code,[1] § 220, subd. (b)); count II, first degree burglary (§ 459), with the special allegation that another person, other than an accomplice, was present in the residence during the commission of the offense (§ 667.5, subd. (c)); and count III, rape of an unconscious person (§ 261, subd. (a)(4)). He was sentenced to life with the possibility of parole for count I, and the midterm of six years for count III; the court stayed the term imposed for count II.

Defendant was alleged to have committed the offenses after he had been at a party at the home of the reporting victim (hereinafter "S.N."), and her husband (hereinafter "J.N."), during which defendant, the hosts, and the party guests continually drank beer and vodka for hours. Defendant left the party with his adult sons, but returned to S.N. and J.N.'s house by himself. He drank more beer, went into their house to use the restroom, fell asleep, woke up, got into bed with S.N. and J.N., and performed an act of sexual penetration on S.N. S.N. knew that a man was trying to have sex with her but thought he was her husband. When S.N. realized that he was not her husband, she screamed and her husband confronted him, and defendant left the bedroom.

At his jury trial, defendant introduced evidence about his lengthy history of alcohol abuse and prior blackout incidents. He testified that he blacked out after drinking so much at the party. He thought he was in his own house and didn't realize where he was or who he was in bed with until S.N. screamed. The jury was instructed rape of an unconscious person was an element of both counts I and II, and voluntary intoxication could negate the specific intent elements for counts I and II, but that voluntary intoxication was not a defense to rape of an unconscious person.

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[1] All further statutory citations are to the Penal Code unless otherwise indicated.

As we will explain, defendant engaged in the grossly inappropriate conduct that led to the charged offenses after hours and hours of binge drinking and carousing and which resulted from a far too common suspension of judgment. Nothing about the defendant's conduct evokes any empathy from this court.

Given such facts, however, this court faces the challenge of parsing through confusing and confounding jury instructions to analyze whether the defendant's substantial rights were adversely impacted. Put another way, we must determine whether it is reasonably probable that the jury understood and applied the applicable law.

Of course, there is a significant body of case law recognizing and affirming presumptions about jury's understanding and application of the law. However, we are confronted here with conflicting and inconsistent instructions involving the definitions for the two specific intent crimes in counts I and II, which incorrectly incorporated by reference the definitional element of the general intent crime charged in count III, and the voluntary intoxication instruction.

Moreover, the trial court adjourned in the midst of presenting these conflicting instructions, reconvened the following day, and acknowledged the jurors were likely "bewildered" by the instructions as they were being read to them. A jury with the analytical prowess and discernment to course its way through the instructions and apply the law to the facts in this case, in a manner that satisfies the substantial rights test, would be extraordinary. There being no evidence to validate that conclusion, we must wend our way through this legal thicket as follows, and conclude that we are compelled to reverse counts I and II for prejudicial instructional error.

As we will further explain, we are also compelled to reverse count III, rape of an unconscious person, because there is no substantial evidence that S.N. was "unconscious" as defined by section 261, subdivision (a)(4), and as that phrase has consistently been interpreted by case law.

We will thus reverse counts I, II, and III and remand for further appropriate proceedings.

FACTS

S.N. and her husband, J.N., lived in a house in Dinuba. S.N. worked as a behavioral therapist with autistic children. She also went to school and had a job as a waitress. J.N. worked for a property management company.

S.N. and J.N. were good friends of defendant's son, Gabriel (Gabe) Chavez. J.N. and Gabe had known each other for nearly 10 years, and Gabe worked for J.N. Gabe and his brother, Jerome "Wety" Chavez, frequently visited S.N. and J.N. at their house. S.N., J.N., Gabe, and Wety were in their mid to late twenties.

Defendant and his wife, Gloria, also lived in Dinuba. Gabe and Wety lived with their parents. Defendant was 52 years old at the time of trial. Defendant and Gloria had been married for 32 years. Defendant had worked at the Odwalla juice plant in Dinuba for 15 years.[2]

Defendant's house was about a mile and one-half from S.N. and J.N.'s house. It took about three-to-five minutes to drive from one house to the other.

S.N. and J.N. testified they had been to defendant's house four times to visit and drink with Gabe. S.N. had met defendant twice, and J.N. met him three or four times. S.N. testified that she and J.N. had known defendant for about one year. S.N. testified defendant was not their friend, but "[h]e was our friend's father." J.N. testified that he and S.N. had once spent the night at defendant's house and drank with him. J.N. thought defendant had been to their house once.

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[2] According to the probation report, defendant had prior misdemeanor convictions for resisting arrest in 1987, driving with a suspended license in 1990 and 1998, and disorderly conduct for being intoxicated in a public place in 2007. He had felony convictions for driving under the influence in 1990 and 1992, and served time in state prison. He did not have any prior convictions for serious or violent felonies.

S.N. and J.N. testified that they were at defendant's house about a month before the incident in this case. Defendant drank so much that he passed out. S.N., J.N., and Gabe had to carry defendant into his bedroom because he had too much to drink.

Gabe testified that he had known J.N. for 10 to 15 years, and they also worked together. Gabe testified that S.N. and J.N. had stayed overnight at defendant's house on a prior occasion, and they were getting to know defendant. Gabe testified that about a month before the incident at J.N.'s house, J.N. and S.N. were at a party at defendant's house, and defendant drank too much alcohol and passed out.

The party begins and defendant arrives

Around 11:00 a.m. on Sunday, August 23, 2009, J.N. called Gabe and invited him to come over to their house and hang out in the backyard. Gabe and Wety arrived at J.N.'s house, and joined J.N. and S.N. in their backyard. They sat around, listened to music, and drank beer.

J.N. and S.N. testified that later in the afternoon, defendant separately arrived at their house on his motorcycle. S.N. did not know why defendant was there, and she assumed that Gabe invited him. Defendant hung out for "a little bit." J.N. testified that defendant joined the men on the patio and drank a beer. S.N. also saw defendant have at least one beer.

J.N. testified that while defendant was at their house, defendant's wife called Wety, and Wety told defendant that he needed to go home. Defendant explained that his wife was angry because it was the first day of defendant's vacation, they were supposed to go on a motorcycle ride, and they hadn't left yet.

J.N. testified that defendant left on his motorcycle, and that defendant had been at their house for one or two hours. S.N. thought he had only been there for 30 minutes.

Around 3:00 p.m., J.N. and Gabe went to a friend's house, and they each did "a line" of cocaine. J.N. testified they got the cocaine for free. J.N. just snorted "a small

little line," and did not feel any effect from it. They returned to J.N.'s house, picked up Wety, and went to a neighbor's house to go swimming.

Defendant returns to S.N.'s house

S.N. testified she stayed by herself while J.N., Gabe, and Wety went swimming. At some point, she heard a motorcycle, looked over her fence, and realized defendant had returned to her house. She yelled to the neighbor's house for J.N. and the others to return because she was by herself and there was "a grown man walking towards the house. I didn't want to be by myself."

J.N., Gabe, and Wety returned and joined defendant and S.N. in the backyard. They spent the rest of the afternoon drinking. J.N. did not know how many drinks defendant consumed. S.N. testified that defendant drank beer, but she did not count how many he had. Defendant was not stumbling around or slurring his words.

S.N. testified that defendant said he had argued with his wife because he wanted to take her on a motorcycle ride. Defendant said his wife refused, and she did not want to come over to J.N. and S.N.'s house. S.N. testified she spoke to defendant's wife on the telephone and invited her to come over, but defendant's wife declined.

S.N. testified that around 9:00 p.m., two of Gabe's friends arrived at her house. Neither S.N. nor J.N. invited them.

The party continues into the evening

S.N. and J.N. testified that everyone continued to drink into the evening. S.N. and J.N. did not make or serve food to any of their guests that night, and they did not have a barbeque.

S.N. testified that their guests were hanging around the back patio drinking. There was an ice chest full of beer, and a table was filled with other alcoholic beverages, including a big bottle of vodka. There were no bottles of soda or water. S.N. and J.N. were pouring vodka-and-cranberry mixed drinks for their friends. S.N. was drinking beer and the vodka mixed drinks, and she felt intoxicated.

S.N. and J.N. testified that defendant was also drinking. S.N. thought that defendant was only drinking beer. She did not see him drinking the vodka-and-cranberry drinks. S.N. testified that defendant got "louder and louder," and she believed he was drunk.

S.N. and J.N. testified their friends went in and out of their house during the party. They played music on their computer, which was located in a separate room in the house. Some of the guests went into the house to use the restroom and then returned outside to the party.

S.N. testified that around 10:00 p.m., two more people arrived at the house: Gilbert (Gibby) Chavez (another of defendant's sons), and Daisy Talingo, who was Gabe's girlfriend. S.N. did not invite them but guessed that Gabe did so.

S.N. testified defendant did not flirt with her, but he made sexual comments about the mother of Gabe's former girlfriend. S.N. testified that defendant talked about Gabe's former girlfriend, and "how her mom was hot and he wanted to f*** her." Defendant made that statement more than once, and other people heard him. S.N. testified that Gabe stopped defendant from talking like that. J.N. testified that defendant did not slur his words, stumble, or fall down during the party.

S.N. testified that their friends were having fun at the party. S.N. testified that everyone was in their 20s, with the exception of defendant, who was older. She thought it was awkward for Gabe to have defendant there, since he was the oldest person at the party. "We were all young and [defendant] was, like, [Gabe's] dad."

The party breaks up

S.N. testified that sometime between midnight and 1:00 a.m., J.N. said he had enough. J.N. left the party and went to their bedroom to sleep. J.N. knew that defendant and some other people were still at the party, but he felt comfortable leaving S.N. with them.

S.N. testified that sometime between 1:50 a.m. and 2:00 a.m., defendant, Gabe, Daisy and Wety left S.N.'s house together. They were the last guests to leave. S.N. walked them to the front yard. She saw Gabe's truck and defendant's motorcycle parked in front of her house. S.N. testified she never actually saw any of them get into Gabe's truck, and she never heard defendant's motorcycle start.

S.N. said goodbye and went back to her house. S.N. testified that she closed and locked all the outer doors to the house, including the sliding glass door in the dining room.

S.N. goes to bed

S.N. testified their bedroom was directly to the left of the front door and across from the sliding glass door. There was only one doorway into their bedroom. J.N. slept on the side of their bed, which was closest to the doorway. S.N. slept on the other side of the bed, which was closer to the bedroom wall. There was a dresser and a television stand on that corner of the bedroom.[3]

After everyone left the party that night, S.N. left on her T-shirt, tank top, and underwear, and put on a pair of sleep shorts. She was about to get into bed, but discovered that J.N. was lying sideways across their king-size mattress. She moved J.N. into the correct position, and he did not wake up. She got into the middle of the bed, next to J.N., and went to sleep.

[3] S.N. and J.N. testified that defendant's house was about twice as large as their house, and the floor plans were different. In S.N.'s house, the bedroom was located to the left of the front door. At defendant's house, the living room, hallway, and kitchen were just off the front door, and the four bedrooms were down a long hallway and at the back of the house. Someone could enter defendant's bedroom through a sliding glass door from the backyard.

Defendant commits an act of sexual penetration on S.N.[4]

S.N. testified that she consumed about 12 drinks between 11:00 a.m. and 2:00 a.m. She drank about 10 beers and could not remember how many mixed vodka-and-cranberry drinks that she consumed. She felt intoxicated earlier in the day but stopped drinking about an hour before everyone left because they ran out of beer.

S.N. stated that she no longer felt intoxicated after everyone left her house and when she got into bed and went to sleep. S.N. testified about her next memory:

"Q. And then do you know if you fell asleep?

"A. Yes.

"Q. Okay. And what, if anything, do you remember next?

"A. I remember waking up to, umm, a hand on my hand.

"Q. Okay. And then what happened?

"A. Placed it on his penis.

"Q. Then what happened?

"A. He began to move it.

"Q. Okay. And move—move what?

"A. Move—move my hand up and down.

"Q. Okay. And then what happened?

"A. And it was pushed in my vagina area."

S.N. testified that when the man put her hand on his penis and moved her hand up and down, she thought that J.N. wanted "to have sex with me. He wants me to make him

[4] In issue IV, *post*, we will find that defendant's conviction in count III for rape of an unconscious person is not supported by substantial evidence, given the nature of S.N.'s undisputed testimony.

get hard so we could have sex." "[W]hen … his hand was over mine, yeah, I did think it was my husband."

S.N. testified that the man pushed his penis inside her vaginal area and was trying to push his penis into her vagina, but his penis was not erect and "it wouldn't go in." The man whispered to her that " 'it's sleeping,' " or " 'it's asleep.' " The man did not slur his words. S.N. still thought that the man was J.N.

S.N. testified that the man's penis was inside her labia but it did not go into her vagina. S.N. testified what happened after the man whispered to her:

> "Then it stopped, and I put my hand on his head. And I felt coarse hair, and I turned around and I looked to where my husband was laying, and my husband was right there. [¶] And then I turned back and looked again, and I saw a big image of a body. And I jumped up and I started hitting my husband to wake up, that somebody was in our bed."

S.N. stated that the man did not touch her again.

S.N. believed that about 15 seconds passed from the first time she felt someone touch her hand to when she realized that person was not J.N. S.N. testified the other man had been lying next to her on the wall-side of the bed. S.N. had been lying on her side, and she and the other man were facing each other. S.N. testified the man never tried to get on top of her, and he was always lying next to her.

S.N.'s testimony about J.N.'s reaction to her screams for help

S.N. stated that she screamed. J.N. woke up and turned on the light. The other man was standing at the foot of the bed, and S.N. saw that man was defendant. S.N. thought defendant was only wearing boxer shorts.

S.N. testified that defendant walked toward the bedroom door. J.N. pushed him against the dresser and asked, " 'Who are you?' " Defendant said, " 'It's me. It's me. It's Gilbert.' "

S.N. realized she was only wearing her tank top and T-shirt, and that her sleep shorts and underwear were off her body. S.N. testified she had not taken them off. S.N.

found her shorts and underwear on the floor at the foot of the bed. She did not think that she had taken off her clothes.

S.N. testified that defendant walked out of the bedroom. Defendant did not stumble when he left. S.N. testified that J.N. left the bedroom to see where defendant went. S.N. remained in the bedroom and cried. After awhile, J.N. returned to the bedroom and said, " 'He's still on the back patio.' " S.N. could hear defendant's voice from the backyard. She asked J.N., " 'Why is he still here? Tell him to leave.' " S.N. testified that she used the bathroom and took a shower because she felt "gross" and "disgusted" that another man touched her. S.N. testified she never saw defendant leave the house, but she heard his motorcycle start.

J.N.'s testimony about his reaction to S.N.'s screams for help

J.N. testified that he did not remember anything after he left the party and fell asleep in bed. He did not wake up when S.N. repositioned him in the bed.

J.N. testified he woke up when he heard S.N. scream, " 'Who is this? Who are you? There's somebody here.' " J.N. testified that S.N. was repeatedly shaking and hitting him, and saying " 'There's somebody here. There's somebody with us.' " S.N. was screaming very loud: " 'Oh, my God. Who are you? There's somebody here with us. [J.N.], wake up, wake up. There's somebody here with us.' "

J.N. woke up and asked S.N. what was happening. S.N. said there was someone in their room. S.N. was crying in bed, but she did not say anything about a sexual assault. J.N. saw the silhouette of someone walking in their bedroom and around the side of the bed.

J.N. testified he was "freaked out" and scared. J.N. asked the person who he was, and the person walked toward him. J.N. pinned him up against the dresser as hard as he could. J.N. screamed, " 'What the hell are you doing with my wife.' " Defendant said: " 'Hey, take it easy, [J.N.] It's me. It's Gilbert. It's me. It's Gilbert.' " Defendant added: " 'I'm just here. I came back.' "

J.N. testified he turned on the hall light and saw defendant. Defendant was wearing a T-shirt and boxer shorts. J.N. asked S.N. if she was alright. S.N. kept crying. Defendant walked past J.N. and left the house through the sliding glass door. J.N. thought the sliding glass door was already open when defendant walked through it: "I think he walked right through it without opening it."

J.N. stayed in the bedroom and again asked S.N. what happened. S.N. continued to cry and said that, " 'He was trying to stick it in me. He was trying to f*** me.' "

J.N. locked all the doors and found defendant in the backyard. Defendant was wearing his pants, but J.N. did not know where he had retrieved his pants from or when he had put them on. Defendant tried to open the sliding glass door and enter the house, but the door was locked. Defendant shook the door and said, " '[J.N.], let me in. Let me come back in.' " Defendant tapped on the door and said, " 'Just let me back in. We need to talk. Let me come back in.' "

J.N. told defendant through the door, " 'Why have you done this to us? What are you doing?' " J.N. told him to get out of there.

J.N. went back to the bedroom to check on S.N.. She was in the shower and crying, and J.N. tried to console her. Defendant again knocked on the door and said, " '[J.N.], let me back in, man.' " S.N. asked why defendant was still there and told J.N. to get him out of there.

J.N. went to the door and told defendant, " 'Get the hell off of our property. Get out of here.' " J.N. testified defendant walked away from the door. J.N. heard the gate slam, and heard a motorcycle start. He looked out of the front window, and he saw defendant drive away on the motorcycle.

At trial, J.N. initially testified that defendant did not appear intoxicated when he found him in the bedroom. On cross-examination, however, J.N. testified that defendant was highly intoxicated. On further examination, J.N. testified that he believed defendant

was intoxicated but knew what he was doing based on his observations of defendant's conduct and actions that night.

After defendant left the house

After defendant left, J.N. and S.N. talked about what had just happened. They didn't know how defendant got into the house. S.N. was shaking and in a "terrible state." S.N. testified she did not call the police because she was in shock, and defendant was the father of their friend, Gabe.

J.N. testified he thought about calling the police, but he needed to figure out what happened. He asked S.N. what defendant did to her, and whether he had raped her. J.N. also was confused and had to think about the situation because defendant's son was his best friend.

Around 4:00 a.m., J.N. repeatedly tried to call Gabe's cell phone, but Gabe didn't answer. J.N. called Gabe's house, and defendant's wife answered. J.N. told her that he needed to talk to Gabe. Gabe came on the line, they talked for about 15 minutes, and Gabe was crying. S.N. testified she heard J.N. call Gabe, and Gabe was "crying and apologizing."

Later that morning, J.N. and S.N. continued to discuss whether to call their parents or the police. J.N. testified that if defendant had been a stranger, he would have called the police, but it was hard to decide what to do since defendant was his best friend's father.

S.N. and J.N. call the police

A few hours later, on Monday, August 24, 2009, S.N. got up and went to work. Later that day, J.N. told her that they needed to call the police. S.N. agreed. S.N. testified that she decided to call the police "[b]ecause I had been thinking about it all day, and I felt it was necessary to call." J.N. testified they decided to call the police after talking to his parents. An officer came to their house, and they made a report. S.N.

testified she showed the officer the T-shirt and shorts she had been wearing that night, but the officer did not take the clothes with him.

S.N. and J.N. stayed with his parents the night after the party, and then moved in with her relatives. They never again slept in the bedroom or the bed where defendant touched her. S.N. and J.N. later sold their house because S.N. did not want to live there anymore, and she did not want "to have to relive that night over and over, seeing that room every night and whole scene, backyard, everything." J.N. packed their belongings because S.N. would not go back inside.

About a week after the incident, S.N. went to her own doctor to determine if she had a disease. The tests were negative. She never provided the results to the police.

At trial, S.N. testified that she had no trouble remembering what had happened during the party and in her bedroom, even though she had been drinking that day.

The initial police report

Around 8:30 p.m. on August 24, 2009, Dinuba Police Officer Nunez responded to their residence and spoke to J.N. and S.N. J.N.'s parents were also there. J.N. and S.N. reported that defendant had sexually assaulted S.N. J.N. said they had delayed reporting the incident because he could not believe that his friend's father sexually assaulted S.N. J.N. said that they had a barbeque at their house that night, and everyone had just been hanging out. Officer Nunez looked for any signs of forced entry and did not find anything.

Officer Nunez testified that S.N. said that her shorts and underwear were removed during the sexual assault. S.N. never said defendant had ejaculated. Nunez did not collect any of S.N.'s clothes because he did not think they had any evidentiary value. He did not ask her to submit to a medical examination because he did not have any information that semen or hair samples could have been collected from her.

The follow-up investigation

On August 31, 2009, Dinuba Police Detective Padama went to J.N. and S.N.'s house to conduct a follow-up investigation. S.N. was not there. J.N. was packing up the house and loading boxes into a trailer. Padama asked J.N. about why he didn't report the sexual assault right away. J.N. said he was in shock when it happened, and he did not know what to do.

J.N. told Padama that his friends were hanging out and drinking alcohol at his house that night. J.N. said that defendant was highly intoxicated when J.N. discovered he was in their bedroom.

For the first time in the investigation, J.N. told Padama that the sensor for a backyard light had been disturbed so that it would not automatically work that night. Padama dusted the sensor lights for fingerprints and did not find any evidence.[5] Padama did not see any signs of forced entry in the house. He asked J.N. for the clothes S.N. had worn that night. J.N. said S.N. took all her clothes with her.

On September 1, 2009, Detective Padama interviewed S.N. at the police station. S.N. was shaking, crying, and upset. She had to take several small breaks just to gain her composure. S.N. said she had been drinking that night, and that she had 10 beers and a couple of vodka-and-cranberry mixed drinks.

Padama did not ask S.N. to submit to a sexual assault examination because S.N. did not say that defendant had ejaculated, it had been more than a week since the incident, and protocol required such an examination within 48 hours.

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[5] An automatic sensor light was the only light source in J.N. and S.N.'s backyard. At trial, S.N. testified that the light worked during the party, but she later determined the sensor had been turned so that it faced upwards, which would have prevented the light from being automatically activated.

Detective Padama testified he had ridden motorcycles for many years, and a person had to be coordinated in all their limbs to operate, accelerate, and brake a motorcycle.

Character Witnesses

Lorena Botkin and Veronica Angula-Pack testified they had known S.N. for many years, and S.N. had a reputation for being an honest person.

DEFENSE EVIDENCE

Defendant's prior use of alcohol

Defendant's family extensively testified about his prior use of alcohol and resulting blackouts. Gabe and Wety, defendant's sons, testified that they had seen defendant drink so much that he would pass out. On some occasions, defendant drank so much that it appeared he did not know what he was doing.

Gabe and Wety testified they had never seen defendant act inappropriately with their mother or any other woman. Defendant had a reputation for respecting women, and he did not have reputation for being violent toward women. They had never seen defendant act aggressive or violent toward women.

Gloria Chavez, defendant's wife, testified that in her opinion, defendant was not violent or sexually forceful toward women. He had never cheated on her. He had never acted sexually violent toward her, or forced her to have sex against her will. Gloria testified that defendant had a good relationship with his sons, and he liked to hang out with them.

Gloria testified that defendant typically wore a T-shirt and boxer shorts to bed. It was defendant's custom and habit to grab her hand and place it on his body. [S]ometimes he says it's not doing nothing. You know, give me a massage." Gloria testified that sometimes she would be asleep when defendant touched her, but she would not sleep through it.

Gloria testified defendant had a history of drinking. He started to drink excessively in 1982 or 1983. Defendant would get drunk to the point where he would pass out. Gloria had seen defendant drink so much that it appeared he did not know what he was doing.

Gloria testified that defendant quit drinking in 1991 or 1992. Gloria testified they made a deal: defendant agreed to stop drinking if Gloria agreed to stop smoking, and they accomplished their goals. On cross-examination, Gloria admitted that defendant went to prison in 1992, and served three years for driving under the influence. Gloria said defendant made the deal to stop drinking after he was released from prison.

Gloria testified that defendant did not drink for about 15 years. However, he started drinking again about three or four years before he was arrested in this case. His drinking was worse than in the previous years. He drank about every three weeks, and the alcohol affected him "really bad." He would act jolly and happy when he drank. He also drank so much that he would pass out. There were instances where he drank so much that he did not know what he was doing, and could not remember what he had done.

Gloria testified that when defendant was drunk, he never acted violently towards her, or forced her to have sex, because "he can't perform." When defendant was drunk, he would be "sloppy, touchy, feely, but we don't get – more like I said, he can't perform."

Gabe's trial testimony

Gabe extensively testified about the events which led to the charged offenses. Gabe explained that the night before the incident (Saturday, August 22, 2009), he had "partied" with S.N. and J.N. Around 9:30 a.m. on Sunday, August 23, 2009, J.N. called Gabe and they talked about the previous night. J.N. said "he had a long day, I had a long day drinking." Gabe asked J.N. what he wanted to do about it. J.N. said "he was hurting" and "let's start drinking again."

Gabe arrives at J.N.'s house

Gabe and Wety arrived at J.N.'s house around noon. Gabe brought an ice chest with 14 to 16 beers. J.N. and S.N. were sitting on the backyard patio. S.N. and J.N. were already drinking beer, and they had their own ice chest full of beer. Gabe did not see any hard liquor at that time.

Gabe thought J.N. and S.N. did not look normal. He believed they were still feeling the effects from drinking the previous night. Gabe testified J.N. and S.N. did not serve any food, and he never saw anyone eat the entire time he was at J.N.'s house.

S.N. invites defendant and his wife

Gabe testified that everyone was already getting "buzzed" after just one hour of drinking. J.N., S.N., and Gabe were trying to find a particular song on the computer and could not remember the name. Just before 2:00 p.m., Gabe called his own house, spoke to his mother, Gloria (defendant's wife), and asked about the song. Gabe testified that S.N. took the telephone away from him when she realized that he was speaking to Gloria. Gabe testified that S.N. invited his parents to join them as they drank and listened to music.

Defendant arrives at J.N.'s house

Gabe testified that around 3:00 p.m., defendant arrived at J.N.'s house on his motorcycle by himself. J.N. and S.N. warmly greeted him. Gabe testified that it was not strange for defendant to hang out with Gabe's younger friends. Defendant had done it before, and J.N. and S.N. had "been over to our house before, and we've had little get-togethers." Defendant's wife, Gloria, did not join the party because she was babysitting their new grandchild.

Gabe testified that defendant did not stay long at J.N.'s house. Defendant drank a couple of beers and had one mixed drink. Around 3:30 p.m., defendant left J.N.'s house on his motorcycle and headed back to his own home.

J.N. and Gabe use cocaine

Gabe testified that after defendant left J.N.'s house, J.N. said he felt the effects of the beer and needed a " 'picker-upper.' " Around 5:00 p.m., Gabe and J.N. went to another location and used cocaine. After using the cocaine, Gabe and J.N. went to the neighbor's house to go swimming with Wety.

Defendant returns to J.N.'s house

Gabe testified they were in the pool for about 10 minutes when they heard S.N. yelling for J.N., that defendant had returned to the house. Gabe testified that around 6:30 p.m., Gabe, J.N., and Wetty went back to J.N.'s house and found defendant there.

Gabe testified that around 6:40 p.m., defendant and J.N. left to purchase more beer and vodka. Defendant and J.N. returned with the alcohol. Defendant and the other guests drank more beer, and S.N. served vodka-and-cranberry mixed drinks.

Gabe testified everyone continued to drink. Gabe drank a lot of beer and vodka-and-cranberry mixed drinks. J.N. and S.N. consumed the mixed drinks and appeared intoxicated. Other guests arrived at the party and also brought alcohol.

Around 11:30 p.m., Gabe left J.N.'s house. He picked up Daisy, his girlfriend, and purchased more beer. Gabe and Daisy returned to J.N.'s house, but defendant was not there. Shortly afterwards, defendant returned to J.N.'s house with Gabe's other brother. Defendant was not riding his motorcycle.

Gabe testified that everyone continued to drink, and defendant looked intoxicated. Gabe lost track of how much alcohol defendant consumed, but he knew defendant kept drinking beer and had at least one mixed drink. Gabe described the party as "just a normal drinking session where you just drink and just of a lot of … joking," and everyone had a good time.

Gabe testified that around 1:15 a.m., J.N. said he was "done" and went to bed. S.N. stayed up with defendant and the other remaining guests.

Gabe testified that defendant was more intoxicated that night than he had seen him in awhile. S.N. sat next to defendant, and she never appeared uncomfortable with him. Defendant was talking loudly and slurring his speech. Gabe told him to "chill."[6] Gabe never heard defendant make any sexual remarks about the mother of Gabe's former girlfriend.

Gabe and defendant leave J.N.'s house

Gabe testified that a little before 2:00 a.m., he told his friends that he was going home because he had to work the next day. Gabe grabbed his ice chest, and Gabe, Wety, Daisy, and defendant left in Gabe's truck. Daisy drove the truck because she had not been drinking. Gabe testified that defendant's motorcycle was not at J.N.'s house.

Gabe testified that Daisy drove them to defendant's house and everyone got out. It was about 2:00 a.m. Gabe carried their ice chest into the backyard. It still contained beer. Defendant and Wety sat in the backyard and continued to drink beer from the ice chest. Gabe testified defendant was pretty intoxicated at this point, because he had been drinking all day and night, and there had been a lot of beer and mixed drinks. Gabe further testified that defendant was more intoxicated than he had ever seen him.

Gabe and Daisy went into the house and went to bed, and that was the last time he saw defendant that night. Gabe testified that while he drank a lot that night, he still had a clear memory of what happened.

J.N. calls Gabe

Gabe testified that around 4:30 a.m., defendant knocked on his bedroom door and said that J.N. needed to talk to him. Defendant was slurring his words and drunk. Gabe

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[6] Gabe was impeached with his prior statement to an investigator, given during an interview on September 23, 2009, when he failed to mention that defendant was drunk and slurring his speech. At trial, Gabe testified the investigator just asked questions, Gabe answered the questions that were asked, Gabe said defendant had been drinking, but he did not give further details.

checked his cell phone and saw some missed calls and text messages from J.N., starting at 4:00 a.m. Defendant handed the house telephone to Gabe.

Gabe testified he talked to J.N. for about five minutes. J.N. was "saying things," and asked Gabe what was going on. Gabe said he didn't know and would try to find out. Gabe hung up and tried to talk to defendant. Defendant was sitting in the backyard, and Gabe testified he "couldn't get nothing out of him." Gabe called J.N. and said he did not know what was going on. After the second call, Gabe stayed awake because he was disturbed and shaken about what he had been told.

Jerome "Wety" Chavez

Wety testified that around noon on August 23, 2009, he went to J.N.'s house with Gabe, and they brought an ice chest full of beer. J.N. and S.N. were drinking vodka and they looked intoxicated. Wety drank beer and did not have any mixed drinks, but he was getting "a buzz." About an hour later, J.N. and Gabe left to buy more alcohol.

Wety testified that between 1:30 p.m. and 2:00 p.m., defendant arrived at J.N.'s house on his motorcycle. J.N. and S.N. welcomed defendant to their house. Wety testified that everyone sat outside and drank. Wety did not keep track of how many beers defendant consumed, but he thought defendant had a "buzz." Defendant stayed for about an hour and then he left around 2:00 p.m. Gabe and J.N. also left. Wety stayed at the house with S.N.

About 30 to 45 minutes later, Wety went swimming at a neighbor's house. J.N. and Gabe later arrived at the neighbor's house and also went swimming. After several minutes, S.N. yelled over the fence that defendant had returned to J.N.'s house.

Wety testified that everyone kept drinking that afternoon. Defendant, J.N., and S.N. appeared intoxicated. Wety invited some mutual friends to the party. They arrived with vodka, beer, and tequila. Wety did not see defendant drink any hard alcohol, but J.N. and S.N. were consuming hard alcohol.

Around 12:30 a.m., Gabe left to pick up Daisy, and defendant left J.N.'s house on his motorcycle. Wety did not see defendant drive away, but he heard the motorcycle start. Gabe and Daisy returned to J.N.'s house with an 18-pack of beer. Several minutes later, defendant also returned to J.N.'s house.

Wety testified defendant, J.N., and S.N. were drunk that night. Wety became extremely intoxicated but said he remembered what happened that night. Around 1:00 a.m., J.N. said he was done and went to bed. About 20 to 30 minutes later, Wety fell asleep on a couch in J.N.'s garage.

About 15 minutes later, Gabe woke up Wety, and said they were leaving. Wety left the party in Gabe's truck with defendant, Gabe, and Daisy. Wety and defendant sat in the truck's back seat, and Daisy drove. Wety did not see defendant's motorcycle at J.N.'s house.

Once they arrived at defendant's house, Wety and defendant stayed in the backyard and continued to drink beer. Wety admitted he was highly intoxicated. Defendant was slurring his words and very intoxicated. After awhile, Wety and defendant went inside the house, and Wety went straight to bed. Wety testified defendant was still inside the house when Wety went to bed.

Daisy Talingo

Daisy, who was 22 years old, testified that she was dating Gabe at the time of the party at J.N.'s house. Daisy knew defendant from her prior visits to defendant's house and thought he was a good person. She had never seen defendant act violently toward women, and he acted protective toward her because she was dating Gabe.

Around 11:00 p.m. on the night of the party, Gabe called her and asked if she wanted to go to "a little 'kickback' " party and hang out. She said yes. Gabe picked her up, they bought more alcohol, and then they went to J.N.'s house. Daisy described the party as "a typical kickback." Everyone was talking and drinking.

Daisy testified that she stayed sober and did not drink that night. Defendant was at the party, and Daisy saw him drinking. Daisy testified that she could not tell if defendant was intoxicated, but he was interacting with everyone, "telling us jokes, making us laugh. So was everyone else, so, you know, he seemed drunk, intoxicated, but I don't know to what level." S.N. was also drinking.

Daisy testified that she later drove defendant and his sons back to defendant's house. Daisy and Gabe went into the house and went to sleep in Gabe's bedroom. Daisy did not know where defendant went.

Daisy testified that after they fell asleep, Gabe's cell phone started to ring, but he did not want to answer it. Afterwards, the house telephone started to ring. Someone knocked on the door of Gabe's bedroom and said Gabe was wanted on the telephone. Daisy did not know who knocked on the door. Gabe left the bedroom and took the call. Gabe returned to the bedroom and said he was shaken up.

Gloria Chavez's additional trial testimony

Gloria testified that at 2:00 a.m. on August 24, 2009, she was already in bed and heard defendant return home. Defendant walked into their bedroom, he did not get into bed with her, and he went straight into the backyard through the sliding glass door. Gloria testified that when she woke up the next morning, defendant was asleep on the living room couch. He did not tell her anything about the previous night.

Defense character witnesses

Gabriella Hernandez and Gloria Vela testified that they had worked with defendant at the Odwalla plant for many years. They said he worked primarily with women, and he was not a pervert, violent or aggressive toward women, or violent in the workplace. They believed he had a reputation for being respectful, considerate, and polite with women.

DEFENDANT'S TRIAL TESTIMONY

Defendant testified at trial that S.N. and J.N. had been to his house on previous occasions for parties and barbeques. He had known J.N. for about one year. He always got along with J.N. and S.N. and made them feel comfortable in his house. Defendant had previously been to J.N.'s house, and he felt very comfortable there. Defendant testified he had never been sexually attracted to S.N.

Defendant testified he had an alcohol problem. He previously went to prison for driving under the influence. He was released from prison in 1993, and he promised his wife that he would never touch alcohol again. Defendant testified he stayed sober for 15 or 16 years.

Defendant started drinking again about two or three years before he was arrested in this case. Defendant testified there were times when he drank so much that he had blackouts, and he did things that he could not remember. "My drinking is not a whole lot of drinking. But when I do drink, I can go a week or two without, but the day I do drink, I do drink." "I'll drink to drink." Defendant testified he had never been sexually aggressive or violent toward women.

Defendant's first visit to the party

Defendant testified that on Sunday, August 23, 2009, he woke up late and stayed in bed with his wife, Gloria. It was the first day of his vacation, and he asked his wife if she wanted to go for a motorcycle ride with him. She agreed.

While they were talking, Gabe called and asked about a certain song they had heard on a CD. Gloria answered Gabe's question. As Gloria spoke to Gabe on the telephone, she told defendant that S.N. had invited them to go over to J.N. and S.N.'s house. Gloria declined and told S.N. that they had a motorcycle ride planned instead.

Defendant left the house to put gasoline in his motorcycle. He decided to go to J.N.'s house and see what Gabe and Wety were doing. He parked his motorcycle in front of J.N.'s house, went into the backyard, and was warmly greeted by J.N. and S.N.. J.N.

offered defendant a beer and defendant accepted. He sat down, drank the beer, and talked with the others. Defendant testified he felt very welcome in their home.

Defendant testified there was "quite a bit" of alcohol, including a few empty cartons. Defendant said he just stopped by to see how his sons were doing, and to tell them that he and his wife were going on a motorcycle ride. J.N. told defendant to come back after the ride.

As defendant started to leave, J.N. asked if he would drive him to the store to buy more alcohol. Defendant agreed. He was not feeling the effects of the beer. Defendant and J.N. got into Gabe's truck. Defendant drove J.N. to the store. J.N. bought an 18 or 24-pack of beer, two medium-size bottles of vodka, and a few bottles of cranberry juice. They returned to J.N.'s house, and then defendant went back to the front yard to leave on his motorcycle. S.N. and Wety walked into the front yard with defendant and admired his motorcycle. They talked for awhile, and then defendant rode away on his motorcycle.

Defendant's second visit to the party

Defendant testified he drove to his house to pick up his wife. However, his wife said that she could not go on the motorcycle ride because she had to babysit their newly-born grandchild. Defendant decided to ride his motorcycle to meet some friends and left his house.

Defendant testified he headed to Selma and stopped at the "99 Club." He went into the bar and drank two beers. Defendant testified he felt a "very slight effect" from the beers that he had consumed that day. However, he did not have any problems operating his motorcycle.

Defendant left the bar and rode to J.N.'s house. S.N. was by herself, and she said the other men were swimming at a neighbor's house. S.N. warmly greeted defendant and called out to the others at the neighbor's house that defendant had returned.

S.N. offered defendant a mixed drink. He declined and explained he could not handle hard liquor. S.N. mixed a drink for herself. Defendant had a beer.

Defendant testified that J.N., Gabe, and Wety returned to J.N.'s house. J.N. again warmly greeted him. Everyone sat around the table in the backyard and began to drink beer and the mixed drinks. S.N. went inside and played music on the computer. Defendant testified that everyone was laughing, and it was a "very comfortable atmosphere." Defendant testified that he was not uncomfortable to be the oldest person at the party because he did everything with his sons.

At one point during the party, defendant asked if he could use the restroom. J.N. invited him into the house and defendant used the restroom.

Defendant testified that as the sun went down, S.N. brought out mixed drinks for everyone, and he drank a vodka-and-cranberry drink. Defendant testified it had been two years since he had consumed hard alcohol. Defendant testified he had additional mixed drinks and also continued to drink beer.

Defendant testified he was feeling a buzz and everything was a little blurry. S.N. was in the computer room, and she asked defendant about what kind of music he wanted to hear. S.N. seemed comfortable around defendant, and defendant thought they got along very well.

Defendant testified that everyone continued to drink after it became dark. He had consumed about two vodka-and-cranberry drinks, but he lost count of how many beers he had. Defendant did not remember when J.N. left the party to go to bed.

Defendant testified he never made any disparaging or sexual comments about the mother of Gabe's former girlfriend. Defendant had never met that woman, and he was sure he didn't talk about her during the party.

Defendant's third trip to the party

Defendant testified that he decided to leave the party to take his motorcycle home because he did not want to leave it parked in front of J.N.'s house. Defendant was feeling the effects of the alcohol. Defendant testified that he must have been under the influence

when he drove his motorcycle from J.N.'s house to his house, which was about a mile and a half away.

Defendant testified he did not actually remember riding his motorcycle back to his own house. He only remembered standing next to his motorcycle. His next memory was that he was back at J.N.'s house party, but he did not know how he got from his house to J.N.'s house.

Defendant believed he was drunk at that point, and he did not know what time it was. However, the party was still going on. Defendant was not sure how much he drank, but he knew that he was always holding a beer in his hand. He could have had five more beers and a couple of mixed drinks.

Defendant testified his next memory was that someone said "we were going to take the party to our house." Defendant remembered that he walked out of J.N.'s backyard and got into Gabe's truck. Defendant was holding a beer. He sat in the backseat with Wety, and Daisy drove.

Defendant returns to his own house

Defendant testified that he remembered getting out of the truck and being back at his own house. He sat in the backyard and continued to drink the beer that he brought from J.N.'s house. Defendant did not remember whether Wety was in the backyard with him. Defendant testified that he sat by himself in his own backyard for awhile and wondered what happened to everyone else. Defendant walked to the front of his house and saw his motorcycle parked there. He did not see Gabe's truck.

Defendant discovered the front door to his house was locked. Defendant usually kept his house key in his wallet. He reached for his wallet and could not find it. Defendant did not try the back door and thought he was locked out of his own house. He knocked loudly but no one answered.

Defendant realized that he left his wallet at J.N.'s house. Since Gabe's truck was missing, defendant thought the others had just dropped him off at his own house, left him there, and went back to J.N.'s house to continue the party.

Defendant's fourth trip to J.N. and S.N.'s house

Defendant testified that he decided to go back to J.N.'s house to get his wallet. He also went back because he thought the others had returned to J.N.'s house to continue the party. Defendant believed that he walked back to J.N.'s house, and had a "blurry memory" of doing so. He did not think that he rode his motorcycle to J.N.'s house because he did not think he could have driven it at that time.

Defendant testified that he remembered when he reached J.N.'s house. The backyard sensor light was on, but no one was in the backyard. Defendant did not disturb the sensor light. The backyard table was full of beer, bottles, cups, and glasses. Defendant found his wallet on the table and put it in his pocket. He was tired, so he sat down and drank a beer that was already open. There was no one around, and he did not hear anyone talking.

Defendant testified his next memory was that he had to use the restroom. Defendant went to the sliding glass door and discovered it was partially open. He knocked on the sliding glass door and went into the house. He called out for J.N. and S.N., and said he was going to use the restroom. He did not hear any response. He did not think that was odd "because we were in and out of the house constantly and in the computer room or the restroom, and I felt very comfortable there at the house."

Defendant testified the only reason he went into the house was to use the restroom. When he walked out of the restroom, he headed toward the sliding glass door. However, he saw the computer room, and he went inside and sat down because he was tired. He still did not see or hear anyone, and that did not cause him any concern. "I just sat in the chair, and that's all I remember."

Defendant testified that he had a beer when he was in J.N.'s computer room. He remembered that he relaxed in the chair.

> "I remember laying back. Then I don't remember anything else from there. I don't remember going to sleep, or I don't remember anything from there."

Defendant wakes up in bed with S.N.

Defendant testified that his next memory was lying on his side and being awakened by S.N. He was on the side of the bed where he usually slept in his own house with his wife. Defendant felt someone touch his genital area. His boxer shorts were being pulled and tugged. Defendant did not remember placing S.N.'s hand on his penis but conceded that could have happened. Defendant conceded that he engaged in similar behavior when he had sex with his wife: "When I'm drinking I don't know if I do that. But when I'm sober, I will do that."

Defendant testified that someone was whispering or talking to him, but he could not remember what that person was saying. Someone was pulling him closer. Defendant was sure that he did not put his penis into S.N.'s vaginal area.

Defendant testified he did not do anything because he was "like in a daze. I feel like I'm at home."

> "Then I remember feeling a hand around my waist and like trying to pull me. And then I remember rubbing my – like my back, and then to my neck. And that's when I opened my eyes and I looked up, and the room didn't look familiar."

Defendant testified he sat up and looked around. It was dark, but he realized he was not in his own bedroom.

> "And I looked at [S.N.], and she looked at me. And she says, 'Oh, my gosh. Oh, my gosh.' "

Defendant testified he never heard S.N. scream. She kept saying, " 'Oh, my gosh,' " but her voice was not very loud. Defendant got out of bed and stood up. He was wearing his T-shirt and boxer shorts, which is what he always wore to bed.

J.N. got up, asked what was going on, and turned on the light. Defendant testified he tried to walk out of the bedroom because he realized he was not in his own house. He was not trying to run away. Defendant testified that J.N. saw defendant and put out his hand to block him. J.N. asked, " 'What's going on, Mr. Chavez?' " J.N. did not speak kindly to him, but he did not use a "high tone of voice." Defendant replied that he did not know.

Defendant testified that he felt intoxicated when he woke up in bed with S.N., and J.N. started to ask him questions. Defendant was embarrassed and in shock.

Defendant testified that he walked out of the bedroom and looked for his clothes. He found his clothes in the computer room. He sat in the chair and put on his pants and boots. He walked outside and sat down in the backyard. J.N. joined him in the backyard. J.N. sat down and lit a cigarette, and asked, " 'What's going on, Mr. Chavez?' " Defendant replied, " 'I don't know, [J.N.].' "

Defendant testified that J.N. went back into the house. Defendant leaned on the backyard steps and might have fallen asleep. After awhile, J.N. spoke to defendant through the closed sliding glass door, and said that he had to leave. Defendant got up and knocked on the door, and asked to come into the house. J.N. refused. Defendant tried to talk to J.N. through the sliding glass door. J.N. said, " 'I think you better leave, Mr. Chavez.' "

Defendant testified he left J.N.'s house through the gate. He was sure his motorcycle was not parked at J.N.'s house. Defendant vaguely remembered walking back to his own house, going inside, and sitting on the couch.

Defendant testified the telephone rang and he answered it. J.N. was on the line and he asked to speak to Gabe. Defendant walked to Gabe's bedroom and told him that J.N. wanted to talk to him.

Defendant testified that he made "[a] terrible mistake" that night when he got into bed with S.N. He felt the incident occurred because he "over drank." Defendant

believed there were similarities between location of the computer room and bedroom in J.N. and S.N.'s house, and the location of those two rooms in his own house. Defendant had "nothing bad" to say about J.N. and S.N. because they were his son's best friends, and he felt bad about what happened. Defendant said he had never cheated on his wife, and he had never been violent toward women.

REBUTTAL EVIDENCE

J.N. testified that he never called defendant, "Mr. Chavez" when S.N. started to scream. J.N. shoved defendant against the dresser as he tried to get out of the bed and yelled at him about what he was doing there. J.N. never went outside with defendant and smoked a cigarette. J.N. was "100 percent" certain that defendant left on the motorcycle because he saw it parked outside his house, he heard it start, and he saw it pull away.

J.N. testified that after defendant left, J.N. sent a text message to Gabe at 4:00 a.m., and parts of those messages were introduced into evidence: " 'You need to call me. What the f***,' " and " 'with his pants off in my bed at 4:00 a.m. rubbing my naked wife.' "

THE CHARGES, CONVICTIONS, AND SENTENCE

As explained *ante*, defendant was charged with count I, assault with intent to commit rape during a first degree burglary; count II, first degree burglary; and count III, rape of an unconscious person.

The court instructed the jury that it could determine whether defendant's voluntary intoxication prevented him from having the specific intent to commit counts I and II. The jury was instructed that voluntary intoxication was not a defense to count III.

Defendant was convicted as charged of the three counts. He was sentenced to life with the possibility of parole for count I, and the midterm of six years for count III; the court stayed the term imposed for count II.

DISCUSSION

I. Voluntary intoxication and counts I and II

As we will explain, *post*, the court instructed the jury that voluntary intoxication could negate an element of the specific intent offenses charged in counts I and II; that rape of an unconscious person was an element of both counts I and II; and voluntary intoxication could never be a defense to rape of an unconscious person.

This court requested further briefing from the parties as to whether defendant's reliance on voluntary intoxication to negate an element of both counts I and II was undermined by the entirety of the instructions. The People argued that the jury was correctly instructed with the pattern CALCRIM instructions, that defendant never objected to the instructions, and that he waived any error. Defendant asserted that the instructions violated his substantial rights and prevented the jury from considering whether his voluntary intoxication negated the specific intent to commit counts I and II.

We will find that the instructions in this case were inconsistent and confusing, and prejudicially undermined defendant's reliance on the only defense theory he offered at trial, that his voluntary intoxication prevented him from having the specific intent to commit counts I and II. We will further find that these instructional errors violated defendant's substantial rights, and therefore must reverse defendant's convictions for counts I and II.

A. Review of the jury instructions

We begin our analysis with the familiar standards to review the correctness of jury instructions. " 'It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.] "[T]he fact that the necessary elements of a jury charge are to be found in two instructions rather than in one instruction does not, in itself, make the charge prejudicial." [Citation.] "The absence of an essential element in one instruction may be supplied by another or cured in light of the

instructions as a whole." [Citation.]' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 328.)

"It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions. [Citation.]" (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.) "In reviewing the purportedly erroneous instructions, 'we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' [Citations.] In conducting this inquiry, we are mindful that ' "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." ' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 957, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

We consider the instructions as a whole, the jury's findings, and the closing arguments of counsel. (*People v. Cain* (1995) 10 Cal.4th 1, 35-36; *People v. Eid* (2010) 187 Cal.App.4th 859, 883.) We will find error only if it is reasonably likely the instructions as a whole caused the jury to misunderstand the applicable law. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-527; *Estelle v. McGuire* (1991) 502 U.S. 62, 74.)

B. <u>Failure to object</u>

The People assert that the potential conflict between the instructions for the charged offenses and voluntary intoxication may not be reviewed on appeal because defendant did not object to any of these instructions. The People are correct that " '[g]enerally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.]" (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.) In addition, where a jury has been fully instructed on the applicable legal principles pertinent to a case, the court is not required to give instructions sua sponte that elaborate or pinpoint the defendant's theory of the case absent a request. (*People v. Dennis* (1998) 17 Cal.4th 468, 514.)

However, an instructional error that affects the defendant's substantial rights may be reviewed on appeal despite the absence of an objection. (§ 1259; *People v. Prieto* (2003) 30 Cal.4th 226, 247; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) " '[A] defendant need not assert an objection to preserve a contention of instructional error when the error affects the defendant's "substantial rights." [Citation.] In this regard, "[t]he cases equate 'substantial rights' with reversible error" under the test stated in *People v. Watson* (1956) 46 Cal.2d 818 … [Citation.]' [Citations.] 'Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim....' [Citation.]" (*People v. Lawrence* (2009) 177 Cal.App.4th 547, 553, fn. 11.)

The issue we address is whether the definitional instructions for the charged offenses were inherently inconsistent with the voluntary intoxication instruction, and prevented the jury from considering whether defendant lacked the specific intent to commit counts I and II. Defendant did not object or request clarification of these instructions.

A defendant who acquiesces to the court's decision to give inconsistent instructions has not waived appellate review of the issue to the extent any error affected the defendant's substantial rights. (*People v. Harris* (2008) 43 Cal.4th 1269, 1319.) In addition, an instruction which prevents the jury from determining the existence of a defendant's specific intent may affect defendant's substantial rights and is subject to review even in the absence of an objection. (*People v. Dunkle* (2005) 36 Cal.4th 861, 913, overruled on other grounds in *People v. Doolin, supra,* 45 Cal.4th 390, 421, fn. 22.)

C. <u>Use of the pattern instructions</u>

The People further assert that instructional error could not have occurred in this case because the superior court used standardized CALCRIM instructions which "correctly stat[e] the law" as to the charged offenses and voluntary intoxication. In support of this contention, the People cite to California Rules of Court, rule 2.1050,

which states that the goal of the CALCRIM pattern instructions "is to improve the quality of jury decision making by providing standardized instructions *that accurately state the law in a way that is understandable to the average juror.*" (Cal. Rules of Court, rule 2.1050, subd. (a), italics added)

The People fail to mention that California Rules of Court, rule 2.1050 also states: "The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law. *The articulation and interpretation of California law, however, remains within the purview of the Legislature and the courts of review.*" (Cal. Rules of Court, rule 2.1050, subd. (b), italics added.) California Rules of Court, rule 2.1050 further contemplates that the pattern instructions may be subject to improvements or modifications. (Cal. Rules of Court, rule 2.1050, subd. (d).)

While the "[u]se of the Judicial Council instructions is strongly encouraged" (Cal. Rules of Court, rule 2.1050, subd (e)), the superior court's use of pattern instructions in this case does not prevent appellate review as to whether those instructions were erroneous or may have affected defendant's substantial rights. (Cal. Rules of Court, rule 2.1050, subds. (b) & (e).) Indeed, it is well recognized that we independently assess whether the instructions correctly state the law, and the legal adequacy of an instruction is reviewed de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210; *People v. Posey* (2004) 32 Cal.4th 193, 218.) When the correctness of instructions is at issue, an appellate court does not simply defer to the fact that the language was taken from pattern instructions, but instead carefully reviews those instructions to determine whether they correctly state the law. (See, e.g., *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1179-1199; *People v. Chue Vang* (2009) 171 Cal.App.4th 1120, 1129-1131; *People v. Paysinger* (2009) 174 Cal.App.4th 26, 30.) "[J]ury instructions … are not themselves the law, and are not authority to establish legal propositions or precedent. They should not be cited as authority for legal principles in appellate opinions. At most, when they are accurate,… they restate the law." (*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7.)

Moreover, there have been numerous instances where reviewing courts have found that pattern instructions were erroneous, confusing, or misleading. (See, e.g., *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164-1165 [CALCRIM No. 400]; *People v. Nero* (2010) 181 Cal.App.4th 504, 518-519 [CALCRIM No. 400]; *People v. Clark* (2011) 201 Cal.App.4th 235, 251, fn. 12 [CALCRIM No. 3405]; *People v. Moore* (2011) 51 Cal.4th 386, 411 [CALJIC Nos. 8.71, 8.72].) Indeed, pattern instructions have been modified and revised in light of appellate review. (See, e.g., *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1119, fn. 5 [CALCRIM No. 400].)

Thus, the superior court's use of pattern instructions, and defendant's failure to object to those instructions, does not prevent this court from reviewing the entirety of the instructions to determine if the instructions were inconsistent and/or undermined the defense theory as to counts I and II, and thus violated defendant's substantial rights.

D. <u>The charged offenses</u>

We now turn to the charged offenses and the instructions given in this case. In count I, defendant was charged and convicted of assault with intent to commit rape during a residential burglary, in violation of section 220, subdivision (b), which provides in relevant part: "Any person who, in the commission of a burglary of the first degree …, assaults another with intent to commit rape … shall be punished by imprisonment in the state prison for life with the possibility of parole." Any harmful or offensive touching constitutes an assault, and may include " ' "the taking of indecent liberties with a woman, or laying hold of and kissing her against her will …" ' [citation]" or the "touching of a victim's sexual organs without consent." (*People v. Leal* (2009) 180 Cal.App.4th 782, 791 (*Leal*).)

Assault with intent to commit rape during a residential burglary is a specific intent offense because it requires the specific intent to commit rape. (*People v. Earle* (2009) 172 Cal.App.4th 372, 392; *People v. Dixon* (1999) 75 Cal.App.4th 935, 942-943; *People*

v. Dillon (2009) 174 Cal.App.4th 1367, 1378, 1383*; People v. Guerra* (2006) 37 Cal.4th 1067, 1130.)

In count II, defendant was charged and convicted of burglary with the intent to commit a felony therein, in violation of section 459. Burglary is also a specific intent offense. (*People v. Hernandez* (2009) 180 Cal.App.4th 337, 348.) "Although in the typical case, the intent of the burglar is to commit theft …, the relevant statute provides, and the decisional law establishes, that the intent to commit *any* felony will sustain a conviction of burglary. [Citations.]" (*People v. Montoya* (1994) 7 Cal.4th 1027, 1042, fn. 8, italics in original.)

In count III, defendant was charged and convicted of rape of an unconscious person in violation of section 261, subdivision (a)(4). "Rape is a general intent crime [citations], and requires only the perpetrator's criminal intent to commit sexual intercourse without the partner's consent. [Citations.]" (*People v. Linwood* (2003) 105 Cal.App.4th 59, 70 (*Linwood*); *People v. Jones* (2003) 29 Cal.4th 1229, 1256; *People v. Dominguez* (2006) 39 Cal.4th 1141, 1151, fn. 6.) To convict a defendant of rape of an unconscious person, the prosecution must prove defendant knew the victim was unconscious. (*People v. Dancy* (2002) 102 Cal.App.4th 21, 36 (*Dancy*).)[7]

E. <u>Voluntary intoxication</u>

Evidence of voluntary intoxication is not an affirmative defense to a crime. (§ 22, subd. (a); 1 Witkin, Cal. Criminal Law (3d. 2000) Defenses, § 26, pp. 355-356.) Moreover, evidence of a defendant's voluntary intoxication is inadmissible to negate the existence of general criminal intent for a charged offense. (*People v. Atkins* (2001) 25 Cal.4th 76, 81 (*Atkins*).) Rape is a general intent crime such that voluntary intoxication

[7] In issues II and III, *post*, we will further address the impact of the knowledge requirement in section 261, subdivision (a)(4), as it relates to voluntary intoxication and mistake of fact.

does not negate that intent. (See, e.g., *People v. Jones, supra,* 29 Cal.4th 1229, 1256; *People v. Dominguez, supra*, 39 Cal.4th at p. 1151, fn. 6.) As we will explain in issue II, *post*, rape of an unconscious person is a general intent offense and a defendant's voluntary intoxication is not a defense to that crime.

As to a specific intent crime, however, evidence of a defendant's voluntary intoxication may be admissible on the issue of whether the defendant actually formed a required specific intent to commit the charged offense. (*Atkins, supra*, 25 Cal.4th at p. 81; *People v. Carr* (2000) 81 Cal.App.4th 837, 843; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1242-1243; § 22, subd. (b).) A defendant is entitled to a voluntary intoxication instruction as to the specific intent element of an offense "only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 677; *People v. Verdugo* (2010) 50 Cal.4th 263, 295.)

As applied to this case, defendant was charged with count I, assault with intent to commit rape during a residential burglary, and count II, burglary; both counts alleged specific intent offenses. There was substantial evidence of defendant's voluntary intoxication to support the court's decision to give a voluntary intoxication instruction in this case. The court was thus obliged to instruct the jury as to whether defendant's voluntary intoxication prevented him from having the specific intent to commit counts I and II.

F. <u>The instructions</u>

While the court was obliged to instruct the jury as to defendant's voluntary intoxication for counts I and II, the entirety of the instructions were not clear on that point because of the manner in which the court incorporated the offense of rape of an unconscious person as an element of both counts I and II.

Count I

As to count I, defendant was charged with assault with intent to commit rape during a residential burglary in violation of section 220, subdivision (b). However, the court instructed the jury with CALCRIM No. 890, that defendant was charged with "intent to commit *rape with an unconscious woman* while committing first degree burglary." (Italics added.)

> "To prove that the defendant is guilty of this crime, the People must prove that: 1, The defendant did an act by its nature would directly and probably result in the application of a force to a person; 2, The defendant did that act willfully; 3, When the defendant acted, he was aware of the facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; 4, When the defendant acted, he had the present ability to apply force to a person; 5, *When the defendant acted, he intended to commit rape of an unconscious woman*; 6, when the defendant acted, he was committing first degree burglary.
>
> "*Rape of an unconscious woman, first degree burglary are defined in the other instructions to which you should refer*." (Italics added)

Count II

As to count II, defendant was charged with first degree burglary. However, the court instructed the jury that defendant was charged with burglary with intent to commit rape, and read CALCRIM No. 1700 as follows:

> "To prove the defendant is guilty of this crime, the People must prove: One, the defendant entered the building or a room within a building. Two, *when he entered the building or room within a building, he intended to commit rape. To decide whether the defendant intended to commit rape, please refer to the separate instruction that I have given you on that crime*.
>
> "*A burglary was committed if the defendant entered with the intent to commit rape*. The defendant does not need to have actually committed rape as long as he entered with intent to do so. The People do not have to prove the defendant actually committed rape. The People allege that the defendant intended to commit rape. You may not find the defendant guilty of burglary unless you all agree he intended to commit that crime at the time of the entry." (Italics added.)

Count III

As to count III, the court instructed the jury with CALCRIM No. 1003, that defendant was charged with "raping a woman who [is] unconscious of the nature of the act," and read the elements of that offense.

Specific and general intent

The court further instructed that "assault with the intent to commit a sexual offense" as charged in count I, and burglary as charged in count II, "require[d] a specific intent or mental state."[8] The court also instructed that count III, rape of an unconscious woman, was a general intent offense.

Voluntary intoxication

As for voluntary intoxication, the court instructed the jury with the following version of CALCRIM No. 3426.

> " … You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding when the defendant acted with the intent to do the act required.
>
> "A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing it could produce an intoxicating effect, or willingly assuming the risk of that effect.
>
> "*In connection with the charge of assault with the intent to commit a sex crime*, the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent to commit a sex crime. If the People have not met this burden, you must find the defendant not guilty of assault with intent to commit a sex crime.
>
> "*In connection with the charge of burglary*, the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent to commit a felony. If the People have not met this burden, you must find the defendant not guilty of burglary.

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[8] CALCRIM No. 1003, rape of an unconscious person, was the only instruction defining a sexual offense which was given to the jury.

"In connection with the lesser included charge of attempted rape, the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent to commit a rape. If the People have not met this burden, you must find the defendant not guilty of a lesser crime of attempted rape.

"*You may not consider evidence of voluntarily [sic] intoxication for any other purpose. Voluntarily [sic] intoxication is not a defense to rape of an unconscious woman.…*" (Italics added.)

G. <u>The inconsistent instructions</u>

We are mindful that in determining the correctness of the jury instructions, we must review the entire charge of the court. (*People v. Bolin, supra*, 18 Cal.4th 297, 328.) However, our review of the entirety of the instructions leads to the conclusion that the jury received inconsistent instructions as to the only possible defense theory in this case: whether defendant had the specific intent to commit counts I and II, or his voluntary intoxication prevented him from being able to form that intent.

We note that the court repeatedly instructed the jury that "rape of *an unconscious woman*" was an element of count I, even though section 220, subdivision (b) defines the offense as assault with the intent to commit *rape* during a residential burglary." (§ 220, subd. (b), italics added.) The court also incorporated by reference the definitional instructions for count III, rape of an unconscious person, to define the sexual offense element of count I. The record is silent as to why the court did so. Nevertheless, we will review the correctness of the instructions based on the language which was actually given to the jury. As we will explain, this apparent definition error implicated the jury's consideration of defendant's voluntary intoxication theory.

While the jury was properly instructed on voluntary intoxication as to the specific intent elements of counts I and II, the impact of those instructions was undermined by the additional instructions that rape of an unconscious person was an element of counts I and II, and voluntary intoxication was never a defense to rape of an unconscious person. On one hand, the jury was told it could consider whether defendant's voluntary intoxication

prevented him from forming the specific intent required for charged offenses in counts I and II. On the other hand, the jury was instructed that rape of an unconscious woman was an element of both counts I and II, and that voluntary intoxication was never a defense to rape of an unconscious person.

Even if the jury believed defendant was voluntarily intoxicated to the point that it prevented him from having the specific intent to commit counts I and II, it still had to reconcile this potential finding with the court's repeated instruction that voluntary intoxication could never be a defense to the most critical element of both counts I and II – rape of an unconscious person.

The confusion created by these instructions was not untangled during closing argument. The prosecutor initially stated that the jury could consider defendant's voluntary intoxication to "evaluate the defendant's intent to commit the crimes listed in Count 1 and Count 2 …." However, the prosecutor repeatedly made the point to the jury that voluntary intoxication was never a defense to rape, that the jury did not have "to worry about voluntary intoxication as a defense" for rape, and "the law doesn't go, 'Well, okay. You drank too much. You can rape.' *Never. It's not a defense*." (Italics added.) "[Y]ou drink too much and you end yourself up in someone else's bedroom, you got your penis anywhere in her genitalia, you raped. Period."

As noted *ante*, the People assert the instructions were correct because the court used the CALCRIM pattern instructions. The pattern instructions for counts I and II may have correctly stated the elements of the charged offenses, including the reference to other instructions for definitions of particular elements. (See, e.g., *People v. Dillon, supra*, 174 Cal.App.4th at p. 1378 [CALCRIM No. 890 correctly states the elements of assault with intent to commit rape].) However, even though the court instructed the jury that rape of an unconscious person may have been an element of both counts I and II, and voluntary intoxication was not a defense to rape of an unconscious person as charged in count III, the court failed to clarify that the jury could still consider defendant's voluntary

intoxication as it related to *another element* of both counts I and II, namely, whether he had the specific intent to commit the offenses.

The confusion inherent in the instructions was complicated by the way the court instructed the jury. When the court began to read the definitional instructions for count I, it did not read the instructions for the charged offense, but instead read the instructions for the lesser included offenses. The court eventually realized the mistake and advised the jury that it would read the instruction for the charged offense at a later point. The court then read the instructions for counts II and III, the lesser included offenses, voluntary intoxication, and other legal points, and adjourned for the day. When the court reconvened the next day, it acknowledged that the jury may have felt "bewildered because I read these instructions fast," and that it had one final instruction to read. The court finally read the instruction for the charged offense in count I and assured the jury that it would receive the printed instructions in the jury room.

We acknowledge that "as long as the court provides accurate written instructions to the jury to use during deliberations, no prejudicial error occurs from deviations in the oral instructions …. [Citation.]" (*People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1113.) Moreover, our concern is not based on the order in which the court gave the instructions. (Cf. *People v. Chung* (1997) 57 Cal.App.4th 755, 759; *People v. Carrasco* (1981) 118 Cal.App.3d 936, 944.) Instead, we are drawn to the superior court's acknowledgement that the jury might be "bewildered" by the instructions it had already read, which consisted of nearly all the applicable legal principles in the case, because the court read the instructions "fast."

H. <u>Prejudice</u>

When reviewing ambiguous and/or conflicting instructions, "we inquire whether the jury was 'reasonably likely' to have construed them in a manner that violates the defendant's rights. [Citation.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 873, citing *Estelle v. McGuire, supra,* 502 U.S. 62, 72.) In addition, conflicting or contradictory

instructions on the subject of intent may constitute federal constitutional error, requiring reversal unless the error is harmless beyond a reasonable doubt. (*People v. Lee* (1987) 43 Cal.3d 666, 673-674; *People v. Lizarraga* (1990) 219 Cal.App.3d 476, 482.)

"Where two inconsistent instructions are given and one is correct and the other is wrong, an appellate court cannot speculate which one the jury followed. [Citations.]" (*People v. Dollar* (1991) 228 Cal.App.3d 1335, 1342.) The inconsistent and conflicting instructions in this case concerned the very essence of the only defense theory presented to the jury – whether defendant's voluntary intoxication negated the specific intent to commit counts I and II. The error affected defendant's substantial rights because the jury was repeatedly told that rape of an unconscious person was an element of both counts I and II, and that voluntary intoxication could not be considered as a defense to rape of an unconscious person. If the jury followed the instructions given in this case, it would have had little choice but to conclude that it could not rely on voluntary intoxication to determine whether defendant was not guilty of either count I or count II, since it had been instructed that rape of an unconscious woman was an element of both offenses, and voluntary intoxication was never a defense to rape of an unconscious woman. This point was repeatedly reinforced by the prosecutor's closing argument.

We thus conclude that it is reasonably likely the instructions as a whole caused the jury to misunderstand the applicable law and the only defense theory in this case, the error was not harmless beyond a reasonable doubt, and counts I and II must be reversed.

II. <u>Voluntary intoxication and count III</u>

This court asked the parties to address whether the jury should have been instructed that voluntary intoxication was also a defense to one or more of the elements of count III, rape of an unconscious person. The People assert that rape is a general intent offense and voluntary intoxication is not a defense. Defendant disagrees and argues that rape of an unconscious person requires a specific mental state which could have been negated by his voluntary intoxication.

As we will explain, we will conclude that the jury was correctly instructed that rape of an unconscious person was a general intent crime and voluntary intoxication was not relevant to negate that general intent.

A. General and specific intent

Rape is a general intent crime and requires "only the perpetrator's criminal intent to commit sexual intercourse without the partner's consent. [Citations.]" (*Linwood, supra,* 105 Cal.App.4th at p. 70; *People v. Jones*, *supra*, 29 Cal.4th 1229, 1256; *People v. Dominguez, supra*, 39 Cal.4th at p. 1151, fn. 6.) Thus, evidence of a defendant's voluntary intoxication is not admissible when he is charged with the general intent offense of rape. The question of whether defendant was entitled to a voluntary intoxication instruction for count III is thus dependent on whether rape of an unconscious person, in violation of section 261, subdivision (a)(4), is a general or specific intent offense.

"In every crime or public offense, there must exist a union or joint operation of act and intent, or criminal negligence. [Citations.]" (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1166.)

"A crime is characterized as a 'general intent' crime when the required mental state entails only an intent to do the act that causes the harm; a crime is characterized as a 'specific intent' crime when the required mental state entails an intent to cause the resulting harm. [Citation.] 'When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intent is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some future act or achieve some additional consequence, the crime is deemed to be one of specific intent.' [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 518, fn. 15.)

B. Rape of an unconscious person

Section 261, subdivision (a)(4) states that "[r]ape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] Where a person is at the time unconscious of the nature of the act, *and this is known to the accused*." (Italics added.)[9]

To convict a defendant of rape of an unconscious person, the prosecution must prove defendant knew the victim was unconscious. (*Dancy*, *supra*, 102 Cal.App.4th at p. 36.) "Since rape is a general intent crime [citation], the requisite criminal intent is the intent to do the prohibited act. [Citation.] Hence, a person who intentionally has sexual intercourse with an unconscious victim knowing that the victim is unconscious commits rape of an unconscious person." (*Id*. at p. 34.)

> "It is well accepted that rape requires proof of a general criminal intent. [Citation.] General criminal intent is simply the intent to do the prohibited act. The act prohibited by … section 261, subdivision (a)(4) is the act of sexual intercourse with an unconscious person. *The statute also contains an explicit mental state requirement that precludes conviction without proof that the perpetrator knew of the victim's unconsciousness*. *The requisite general criminal intent is simply the intent to have sexual intercourse with an unconscious victim*." (*Dancy*, *supra*, 102 Cal.App.4th at p. 36, italics added.)

Thus, in order to convict a defendant of violating section 261, subdivision (a)(4), the defendant "either must have known or reasonably should have known" of the victim's unconsciousness. *(Linwood, supra,* 105 Cal.App.4th at p. 71.) This knowledge requirement has been described as a "criminal negligence standard." (*Ibid*.) " 'Under the criminal negligence standard, knowledge of the risk is determined by an objective test: "[I]f a *reasonable person* in defendant's position would have been aware of the risk

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[9] As we will explain in issue IV, *post*, section 261, subdivisions (a)(4)(A)-(a)(4)(D) contain four definitions of when the victim is "unconscious of the nature of the act."

involved, then defendant is presumed to have had such an awareness." ' [Citation.]" (*Ibid.*)

C. <u>Knowledge elements and general intent offenses</u>

Defendant relies on *Dancy, supra*, 102 Cal.App.4th 21 and contends that rape of an unconscious person, in violation of section 261, subdivision (a)(4), is a specific intent offense with a specific mental state because the prosecution must prove that defendant knew the victim was unconscious. Defendant thus asserts that his voluntary intoxication would have been relevant as to count III, and the jury should have been instructed that voluntary intoxication could have prevented him from having that specific intent and/or specific mental state of knowledge to commit the offense.

Defendant's assertions about section 261, subdivision (a)(4)'s knowledge requirement are similar to arguments which have been rejected regarding the knowledge elements of assaultive offenses. For example, in *People v. Williams* (2001) 26 Cal.4th 779 (*Williams*), the court held that a defendant was not guilty of assault unless he or she was "aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*Id.* at p. 788.) *Williams* added an important limitation to this conclusion:

> "In adopting this knowledge requirement, we do not disturb our previous holdings. *Assault is still a general intent crime* [citations], and juries should not 'consider evidence of defendant's intoxication in determining whether he committed assault' [citation]." (*Ibid.*, italics added.)

Williams thus concluded that while assault contained a knowledge requirement, that element did not turn the offense into a specific intent crime, and did not permit a defendant to rely on voluntary intoxication to negate defendant's ability to have that knowledge. (*Ibid.*)

In *People v. Wyatt* (2010) 48 Cal.4th 776 (*Wyatt*), the court addressed a similar issue, where defendant was convicted of the assaultive offense of child abuse homicide in violation of section 273ab. As one of the elements of the offense, the prosecution was

required to prove that a defendant caretaker committed an assault with force " 'such that a reasonable person would know it was likely to inflict great bodily injury.' [Citation.]" (*Id*. at p. 780.) *Wyatt* agreed with *Williams* and held that such a knowledge requirement did not turn a violation of section 273ab into a specific intent crime. (*Wyatt, supra*, 48 Cal.4th at pp. 780-782.)

In *Atkins, supra*, 25 Cal.4th 76, the court rejected the argument that voluntary intoxication was admissible to negate the required mental state for arson. *Atkins* held that arson was a general intent crime even though the statutory language required a person to "willfully and maliciously" set a fire. (*Id*. at pp. 81, 84.) *Atkins* held such language did not transform the offense into a specific intent crime, and voluntary intoxication was not admissible to negate the element of general intent. (*Id.* at pp. 81, 85-86.)

As applied to the instant case, we find that the knowledge requirement in section 261, subdivision (a)(4) is similar to the knowledge requirement for the assaultive offenses discussed in *Williams* and *Wyatt*. Rape of an unconscious person is a general intent offense, which requires proof that the defendant knew the victim was unconscious of the nature of the act. (*Linwood, supra*, 105 Cal.App.4th at p. 71.) The existence of that knowledge requirement does not mean that rape of an unconscious person is a specific intent offense. *(Williams, supra,* 26 Cal.4th at p. 788.) The court in this case properly instructed the jury that count III was a general intent offense, and voluntary intoxication was not admissible to negate general intent. In addition, the jury was properly instructed as to the mental state required to find defendant guilty of count III, that he knew the victim was unable to resist because she was unconscious of the nature of the act.

D. *Reyes* and *Whitfield*

We acknowledge that a different conclusion on a related issue was reached in *People v. Reyes* (1997) 52 Cal.App.4th 975 (*Reyes*). *Reyes* considered the effect of defendant's voluntary intoxication and mental disorders on his ability to form the mental state required for receiving stolen property. (*Id*. at p. 979.) *Reyes* held that although

receiving stolen property is a general intent crime, the crime required the specific mental state of defendant's knowledge that the property was stolen, and this mental state could be affected by defendant's voluntary intoxication. *Reyes* held the defendant was entitled to introduce evidence concerning his voluntary intoxication and mental disorders as it affected the knowledge element of the crime. (*Id.* at pp. 984-986.)

In reaching this conclusion, *Reyes* extensively relied on *People v. Whitfield* (1994) 7 Cal.4th 437 (*Whitfield*), which held that evidence of voluntary intoxication was admissible to negate the element of implied malice for second degree murder, even though the crime was classified as a general intent offense. (*Id.* at p. 450; *Reyes, supra*, 52 Cal.App.4th at p. 984.) *Reyes* concluded that " 'the criteria of specific intent for [the purpose of section 22] are not necessarily the same as the criteria of specific intent as a measure of the scienter required for an offense.' [Citation.]" (*Reyes, supra*, 52 Cal.App.4th at p. 984.)

We do not find *Reyes* persuasive on this point because it relied on *Whitfield*, and *Whitfield* has been disapproved and overruled by statutory amendment. *Whitfield's* analysis of voluntary intoxication and intent triggered an amendment to section 22, subdivision (b), which limited the admissibility of voluntary intoxication in murder prosecutions. (*People v. Carlson* (2011) 200 Cal.App.4th 695, 706; *People v. Turk* (2008) 164 Cal.App.4th 1361, 1374-1375; *People v. Timms* (2007) 151 Cal.App.4th 1292, 1299-1301.)

Reyes acknowledged that *Whitfield's* holding had been superseded, but held that *Whitfield's* analysis was still "germane to the admissibility of evidence of intoxication to refute the element of knowledge in other types of crimes …." (*Reyes, supra*, 52 Cal.App.4th at p. 984, fn. 6.) We disagree with *Reyes's* conclusion that *Whitfield's* analysis on that point is still viable, particularly given the subsequent amendment to section 22 which was expressly intended to limit *Whitfield's* holding. (See, e.g. *People v. Carlson, supra*, 200 Cal.App.4th at pp. 705-707.)

We conclude that defendant was not entitled to a voluntary intoxication instruction as to count III. As explained in *Williams*, section 261, subdivision (a)(4)'s knowledge requirement did not implicate a specific intent or a specific mental state that would have permitted the jury to consider defendant's voluntary intoxication for a general intent offense.

Such a conclusion is buttressed by the language of section 22, which provides in pertinent part:

> "(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, *knowledge*, premeditation, deliberation, or malice aforethought, with which the accused committed the act.
>
> "(b) Evidence of voluntary intoxication is admissible *solely on the issue of whether or not the defendant actually formed a required specific intent*, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." (Italics added.)

Section 22 "is part of California's history of limiting the exculpatory effect of voluntary intoxication and other capacity evidence." (*People v. Timms, supra*, 151 Cal.App.4th at p. 1300.) Section 22, subdivision (a) expressly prohibits the use of voluntary intoxication to negate a defendant's capacity to have the knowledge to commit a charged offense. As we have noted, section 22 has been repeatedly amended to limit the circumstances under which a jury may consider evidence of a defendant's voluntary intoxication. These amendments have resulted from "a legislative determination that, for reasons of public policy, evidence of voluntary intoxication to negate culpability shall be strictly limited." (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1117.) We decline to expand the application of voluntary intoxication given the limiting language of section 22, subdivision (a).

III. The court was not required to instruct on mistake of fact

Defendant contends the court had a sua sponte duty to instruct the jury on mistake of a fact as another defense theory in this case, separate and apart from voluntary intoxication. Defendant argues the instructions would have been supported by substantial evidence that he was tired, confused, and disoriented that night, even if he was not intoxicated, such that he blacked out after he entered J.N.'s house and then honestly believed he was in his own house, entered his own bedroom, the woman in bed was his wife, and she consented to have sex. In the alternative, defendant argues his defense attorney was prejudicially ineffective for failing to request mistake of fact instructions.

While the jury apparently rejected defendant's reliance on voluntary intoxication, we have explained that the voluntary intoxication instructions were conflicting, inconsistent, and prejudicial. We will address defendant's contentions about mistake of fact, and find the court did not have a sua sponte duty to give these instructions because the only evidence of any such mistake was inextricably bound to defendant's voluntary intoxication.

A. The court's sua sponte duty

The trial court's sua sponte duty to instruct on particular defenses arises " ' "only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." ' [Citations.]" (*People v. Maury* (2003) 30 Cal.4th 342, 424.)

However, there is no sua sponte duty to instruct on a defense if the evidence of that defense is minimal or insubstantial. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1424 (*Russell*).) On appeal, we independently review the record to determine whether there was substantial evidence to support such a defense. (*People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1054-1055.)

B. Mistake of fact

"At common law, an honest and reasonable belief in the existence of circumstances, which, if true, would make the act with which the person is charged an innocent act, was a good defense. [Citations.]" (*Russell, supra*, 144 Cal.App.4th at p 1425.)

"The Penal Code sets forth the broad outlines of the mistake of fact defense." (*In re Jennings* (2004) 34 Cal.4th 254, 276 (*Jennings*).) Section 26 provides in pertinent part: "All persons are capable of committing crimes except those belonging to the following classes: [¶] … [¶] Three – Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent." Under this defense, when a person " ' "*commits an act* based on a mistake of fact, his guilt or innocence is determined as if the facts were *as he perceived them*." ' [Citations.]" (*People v. Reed* (1996) 53 Cal.App.4th 389, 396 (*Reed*), italics in original.)

An honest and reasonable mistake of fact may be asserted as a defense to a general intent crime. (*Russell, supra*, 144 Cal.App.4th at p. 1426; *People v. Noori* (2006) 136 Cal.App.4th 964, 976-977; *People v. Rivera* (1984) 157 Cal.App.3d 736, 742-743; *People v. Hernandez* (1964) 61 Cal.2d 529, 534-536.) In some circumstances, a defendant's mistake of fact, whether or not reasonable, may negate a specific intent element of a crime, so long as it is honestly held. (*Russell, supra*, 144 Cal.App.4th at pp. 1425-1427; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 10-11; *People v. Scott* (1983) 146 Cal.App.3d 823, 831-833; see also 1 Witkin, Cal. Criminal Law (3d ed. 2000) Defenses, § 39, pp. 371-372.)

Mistake of fact is an affirmative defense on which the defendant bears the burden of proof. (*Jennings, supra*, 34 Cal.4th 254, 280.) "The court has a sua sponte duty to instruct on mistake of fact if the defendant relies on the defense or if there is substantial evidence that supports the defense and the defense is not inconsistent with the defendant's theory of the case. [Citations.]" (*Russell, supra*, 144 Cal.App.4th at p.

1427.) "As a general matter, however, a mistake of fact defense is not available unless the mistake disproves an element of the offense. [Citations.]" (*Jennings, supra*, 34 Cal.4th at p. 277.)

C. Mistake of fact and voluntary intoxication

In general, mistake of fact may be a viable defense when a defendant is charged with rape, assault with intent to commit rape, and burglary. (See, e.g., *Jennings, supra*, 34 Cal.4th at p. 277; *People v. Mayberry* (1975) 15 Cal.3d 143, 153-158 (*Mayberry*); *People v. Burnham* (1986) 176 Cal.App.3d 1134, 1139, fn. 20.) While mistake of fact may seem theoretically applicable to the charged offenses, however, the court did not have a sua sponte duty to so instruct the jury given the nature and circumstances of this case. There is no substantial evidence that defendant's alleged belief about where he was, and what he was doing in bed, was triggered by anything other than his voluntary intoxication.

Witnesses for both the prosecution and defense testified that defendant continuously consumed beer and mixed vodka drinks from the late morning, continuing in the afternoon, through the evening, and into the night and the early morning hours. Defendant continued to drink even after he left J.N. and S.N.'s house with his family. Defendant testified he carried a beer when he walked out of J.N.'s backyard and got into Gabe's truck. Once he arrived at his own home, defendant sat on the patio and continued to drink beer from the ice chest that his sons brought back from J.N.'s house. Defendant testified that when he walked back to J.N.'s house to look for his wallet, he drank another beer while he was in the backyard. Defendant testified he entered J.N.'s house, used the restroom, and sat down in the computer room. His last memory was drinking another can of beer in the computer room.

Defendant's mistake of fact theory was thus inextricably bound to his voluntary intoxication. We have found no authority for giving mistake of fact instructions when that mistake was solely based on voluntary intoxication. Indeed, the mistake of fact

defense has been disapproved in cases of voluntary intoxication. (See, e.g., *People v. Scott, supra,* 146 Cal.App.3d at p. 832, fn. 4; *People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1083; *People v. Geddes* (1991) 1 Cal.App.4th 448, 455-456; see also *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1454 [mistake of fact defense inapplicable when based on delusions that are the product of mental illness].)

Defendant posits that mistake of fact was not inconsistent with his voluntary intoxication defense because the jury could have found he was not intoxicated, but that he was still tired, confused, and disoriented that night which led to his mistake of fact as to where he was, and the identity of the woman that he was in bed with. This argument raises a distinction without a difference. The only evidence as to why defendant may have been tired, confused, and disoriented was because he had been drinking for hours without pausing for either food or sleep. The question for the jury was whether his voluntary intoxication prevented him from having the specific intent to commit counts I and II. While the jury was improperly instructed as to the interplay between voluntary intoxication and the two specific intent charges, that prejudicial instructional error does not mean that there was substantial evidence to support mistake of fact instructions based on anything other than defendant's voluntary intoxication.

D. *Mayberry*, mistake of fact, and rape of an unconscious person

Defendant additionally argues that the court had a sua sponte duty to give a *Mayberry* instruction as to count III, rape of an unconscious person, and to the rape element of count I, assault with intent to commit rape of an unconscious person during a residential burglary, because he had a reasonable and good faith belief that he was having sex with his wife, a woman who would have consented to the act. These arguments lack merit. (*Mayberry, supra,* 15 Cal.3d 143.)

The *Mayberry* defense "is predicated on the notion that ... reasonable mistake of fact regarding consent is incompatible with the existence of wrongful intent. [Citation.]" (*People v. Williams* (1992) 4 Cal.4th 354, 360 (*Williams*), fn. omitted.) The *Mayberry*

defense "has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse. In order to satisfy this component, a defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent. [¶] In addition, the defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction. [Citations.]" (*Williams, supra,* 4 Cal.4th at pp. 360-361, fn. omitted.)

The right to a *Mayberry* instruction in the absence of a request thus depends on whether the defendant has proffered "substantial evidence that the defendant honestly and reasonably, but mistakenly, believed that the victim consented to sexual intercourse." (*Williams, supra*, 4 Cal.4th at p. 361.) "Consent for purposes of rape prosecutions is defined as 'positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.' (§ 261.6.)" (*Williams, supra*, 4 Cal.4th at p. 361, fn. 6.)

There are two problems with defendant's claim that the court had a sua sponte duty to give a *Mayberry* instruction as to the rape element of either count I or count III. First, the *Mayberry* instruction is not available when a defendant is charged with rape of an unconscious person in violation of section 261, subdivision (a)(4). Section 261, subdivision (a)(4) "does not contain a lack of consent element." (*Dancy, supra,* 102 Cal.App.4th at p. 34.) "By including a lack of consent element in the subdivisions setting forth the elements of several types of rape but not including a lack of consent element in the subdivision setting forth the elements of rape of an unconscious person, the

Legislature obviously made an explicit choice *not to require proof of lack of consent* where the victim was unconscious at the time of the act of sexual intercourse." (*Id*. at p. 35, italics added.) Thus, "sexual intercourse with an unconscious person is a criminal sexual offense regardless of real or hypothetical consent." (*Ibid.*)

As a result, mistake as to consent is not a defense to rape of an unconscious person. (*Dancy, supra,* 102 Cal.App.4th at pp. 34-36.) An unconscious or sleeping victim "not only lacks the capacity to give legal consent, he or she cannot possibly give actual consent." (*People v. Giardino* (2000) 82 Cal.App.4th 454, 461, fn. 4.)

> "Unlike a man who engages in an act of sexual intercourse with a conscious woman under the reasonable but mistaken impression that the woman consents (*People v. Mayberry* [(1975)] 15 Cal.3d 143 …) or a man who engages in sex with a conscious minor under the reasonable but mistaken impression that the minor is an adult (*People v. Hernandez* [, *supra,*] 61 Cal.2d 529 …), a man who intentionally engages in sexual intercourse with a woman he knows to be unconscious is clearly aware that he is wrongfully depriving the woman of her right to withhold her consent to the act at the time of penetration. Since a woman may withdraw her consent to a sex act even after the initiation of sexual intercourse [citation], neither a woman's actual 'advance consent' nor a man's belief in 'advance consent' could possibly eliminate the wrongfulness of the man's conduct in knowingly depriving the woman of her freedom of choice both at the initiation of and during sexual intercourse. Consequently, a person who commits the prohibited act necessarily acts with a 'wrongful intent.' " (*Dancy, supra,* 102 Cal.App.4th at pp. 36-37, fn. omitted.)

Dancy further explained that a woman cannot give advance consent to unconscious sexual activity.

> "Even if a woman expressly or impliedly indicates in advance that she is willing to engage in *unconscious* sexual intercourse, a man who thereafter has sexual intercourse with her while she is unconscious necessarily deprives her of the opportunity to indicate her lack of consent. The inherent risk that a man may misinterpret a woman's prior statements or conduct weighs strongly against recognizing 'advance consent' as a defense to rape of an unconscious person since the woman's lack of consciousness absolutely precludes her from making her lack of consent known at the time of the act. *It follows that a man who intentionally engages in sexual*

> *intercourse with a woman he knows to be unconscious harbors a 'wrongful' intent regardless of whether he believes that she has (or she actually has) consented in advance to the act*." (*Dancy, supra*, 102 Cal.App.4th at p. 37, italics added; see also *People v. Hernandez* (2011) 200 Cal.App.4th 1000, 1006 (*Hernandez*).)

In addition, a *Mayberry* instruction is not available when the defendant's mistake of fact is based on voluntary intoxication. "[V]oluntary intoxication cannot be used to support a *Mayberry* defense [citation]." (*People v. Stanley* (1992) 6 Cal.App.4th 700, 706; *People v. Bishop* (1982) 132 Cal.App.3d 717, 722.) The *Mayberry* defense is "premised on mistake of fact." (*Williams, supra*, 4 Cal.4th at p. 362.) It does not apply in the context of voluntary intoxication because a defendant's purported belief the victim consented cannot be characterized as either reasonable or in good faith when it is brought about by self-induced intoxication. (*People v. Guthreau* (1980) 102 Cal.App.3d 436, 443; *People v. Potter* (1978) 77 Cal.App.3d 45, 51.) " 'If, as a result of self-induced intoxication, [defendant] believed that the victim was consenting, that belief would not thereby become either "reasonable" or "in good faith"....' " as defined by *Mayberry*. (*People v. Guthreau, supra*, 102 Cal.App.3d at p. 443.)

E. <u>Conclusion</u>

We conclude that the court did not have a sua sponte duty to instruct on mistake of fact as to any of the three charged offenses because evidence of defendant's voluntary intoxication was the only basis for any mistake of fact instructions. While mistake of fact may be a defense to the general intent offense of rape, defendant cannot rely on mistake of fact as a defense to rape of an unconscious person in this case. The only evidentiary basis for his claim of mistake was entirely based on his voluntary intoxication, and voluntary intoxication is not a defense to rape of an unconscious person. Given these conclusions, we further find that defense counsel was not prejudicially ineffective for failing to request mistake of fact instructions.

IV. Count III is not supported by substantial evidence

Defendant next contends that his conviction in count III for rape of an unconscious person, in violation of section 261, subdivision (a)(4), is not supported by substantial evidence. Defendant asserts count III must be reversed because there is no evidence that S.N. was unconscious as defined by statute and case law, based on her own trial testimony about what happened when defendant touched her and performed the act of sexual penetration. Defendant argues that S.N. was awake and aware that a sexual act was being performed on her as that act occurred. The People argue that S.N. was asleep when defendant began the act of sexual penetration, and the jury's finding that she was unconscious at the time of penetration is supported by substantial evidence.

A. Substantial evidence

When a criminal conviction is challenged as lacking evidentiary support, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "The same standard applies when the conviction rests primarily on circumstantial evidence." (*Ibid.*)

We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin*, *supra*, 18 Cal.4th at p. 331.)

"However, substantial evidence is not synonymous with *any* evidence. [Citations.] A decision supported by a mere scintilla of evidence need not be affirmed on appeal. [Citation.] Furthermore, '[w]hile substantial evidence may consist of inferences,

such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; *inferences that are the result of mere speculation or conjecture cannot support a finding* [citations].' [Citation.] 'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.' [Citation.]" (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393-1394, italics added in original; *People v. Wilson* (2005) 36 Cal.4th 309, 331; *People v. Baker* (2012) 204 Cal.App.4th 1234, 1247.)

A reviewing court must accept logical inferences the jury might have drawn from the circumstantial evidence. (*People v. Maury*, *supra*, 30 Cal.4th 342, 396.) Nevertheless, a reasonable inference " 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] ... A finding of fact must be an inference drawn from evidence rather than ... a mere speculation as to probabilities without evidence.' [Citations.]" (*People v. Morris* (1988) 46 Cal.3d 1, 21, overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) Instead, a reasonable inference " ' "must logically flow from other facts established in the action." ' [Citations.]" (*People v. Velazquez* (2011) 201 Cal.App.4th 219, 231.)

B. <u>Section 261, subdivision (a)(4)</u>

In count III, defendant was charged and convicted of rape of an unconscious person, in violation of section 261, subdivision (a)(4), which states:

> "(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] … [¶]
>
> "(4) Where a person is at the time *unconscious of the nature of the act*, and this is known to the accused. As used in this paragraph, 'unconscious of the nature of the act' means *incapable of resisting* because the victim meets one of the following conditions:
>
> "(A) *Was unconscious or asleep*.

"(B) *Was not aware, knowing, perceiving, or cognizant that the act occurred.*

"(C) *Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact*.

"(D) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's *fraudulent representation that the sexual penetration served a professional purpose* when it served no professional purpose." (§ 261, subd. (a)(4), italics added.)

The following definitions have been given as to the provisions of section 261, subdivision (a)(4). " 'Unconscious' means, among other things, 'not knowing or perceiving: not aware ….' [Citation.] Among the definitions of 'conscious' are: 'perceiving, apprehending, or noticing with a degree of controlled thought or observation: recognizing as existent, factual or true ... recognizing as factual or existent something external ...' [Citation.] Synonyms include 'aware,' meaning 'marked by realization, perception, or knowledge: Conscious Sensible Cognizant ... showing heightened perception and ready comprehension and appreciation: Informed, Knowing, Alert ... Conscious may indicate impingement on one's mind so that one recognizes the fact or existence of something. ...' [Citation.]" [¶] '*Nature*' *means, among other things,* '*the essential character or constitution of something* ....' [Citation.]" (*People v. Ogunmola* (1987) 193 Cal.App.3d 274, 279 (*Ogunmola*), italics added.)

Section 261, subdivision (a)(4)(A) defines unconsciousness to mean "unconscious or asleep." However, the statutory definitions "are not limited to victims unconscious in the ordinary or colloquial sense." (*People v. Stuedemann* (2007) 156 Cal.App.4th 1, 6 (*Stuedemann*).) "It is settled that a victim need not be totally and physically unconscious in order for the statute defining rape as an act of sexual intercourse accomplished with a person who is at the time 'unconscious of the nature of the act' to apply." (*Ogunmola, supra,* 193 Cal.App.3d at p. 279; *Boro v. Superior Court* (1985) 163 Cal.App.3d 1224, 1228).)

"The unconsciousness requirement does not require proof the victim was totally and physically unconscious during the acts in question. [Citation.]" (*People v. Pham* (2009) 180 Cal.App.4th 919, 928 (*Pham*).) "So long as the victim was unaware of the 'essential characteristics of the act,' i.e., *the sexual nature of the act itself*, the unconsciousness requirement will be satisfied. [Citation.]" (*Ibid.*, italics added; *People v. Howard* (1981) 117 Cal.App.3d 53, 56.)

As to the other elements of the offense, "[t]here is no requirement that the defendant use force or violence to accomplish the act of sexual intercourse" with an unconscious person. (*Hernandez, supra*, 200 Cal.App.4th at p. 1006.) Section 261, subdivision (a)(4) defines rape as an act of "sexual intercourse." "The penetration which is required is sexual penetration and not vaginal penetration. Penetration of the external genital organs is sufficient to constitute sexual penetration and to complete the crime of rape even if the rapist does not thereafter succeed in penetrating into the vagina." (*People v. Karsai* (1982) 131 Cal.App.3d 224, 232-233, overruled on other grounds in *People v. Jones* (1988) 46 Cal.4th 585, 600, fn. 8; *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1366.) "While penetration is an essential ingredient of the offense [citation], '[a]ny sexual penetration, however slight, is sufficient to complete the crime.' [Citation.]" (*People v. Minkowski* (1962) 204 Cal.App.2d 832, 842 (*Minkowski*); *People v. Roundtree* (2000) 77 Cal.App.4th 846, 852; § 263.) Penetration may be proved by circumstantial evidence. (*People v. Holt* (1997) 15 Cal.4th 619, 669.)

As we explained in issue III, *ante*, "the Legislature obviously made an explicit choice not to require proof of lack of consent where the victim was unconscious at the time of the act of sexual intercourse. The statute uses the words 'incapable of resisting' to describe the victim's *actual* lack of *awareness* of the act rather than in reference to the victim's *hypothetical lack of consent* to the act. [S]exual intercourse with an unconscious person is a criminal sexual offense regardless of real or hypothetical consent." (*Dancy, supra*, 102 Cal.App.4th at p. 35, italics in original.) "The act of sexual intercourse with

an unconscious person is itself illegal, regardless of 'the victim's "advance consent" or the perpetrator's belief that the victim has consented in advance to the prohibited act.' [Citation.]" (*Hernandez, supra*, 200 Cal.App.4th at p. 1006.)

C. <u>Cases which address unconsciousness</u>

We now turn to a series of cases which address the statutory definitions of unconsciousness as contained in section 261, subdivision (a)(4), and other similar statutes.

In *Minkowski, supra*, 204 Cal.App.2d 832, a doctor was charged with multiple counts of rape of an unconscious person. He told minor female patients that he was performing medical tests on them, inserted medical instruments in their vaginal areas, and then placed something else in their vaginal areas which they felt but could not see or identify. After several examinations, each patient eventually realized that defendant had raped them during the second part of the examinations. (*Id*. at pp. 837-841.) *Minkowski* held there was sufficient evidence of the corpus delicti of rape of an unconscious person, based on the victims' testimony about "the strangeness of the circumstances, the unusual behavior of the doctor, the method of his examination, and the difference between the two parts of the examination." (*Id.* at p. 843.)

In *Ogunmola, supra*, 193 Cal.App.3d 274, defendant was a physician and convicted of two counts of rape of an unconscious person. He conducted pelvic examinations on two women and then sexually assaulted them. The first patient testified that it took her a few minutes to realize he raped her. (*Id*. at p. 277.) The second patient testified that she only realized defendant raped her after he made additional movements over and against her body. (*Id*. at p. 278.)

Ogunmola held defendant's convictions were supported by substantial evidence:

> "[T]he trier of fact could reasonably conclude from the testimony of the victim gynecological patients, who reposed great trust in their physician in placing themselves in positions of great vulnerability from which they could not readily perceive his conduct toward them, that neither was aware

> of the *nature* of the act, i.e., neither consciously perceived or recognized that defendant was not engaged in an examination, but rather in an act of sexual intercourse, until he had accomplished sexual penetration, and the crime had occurred. [Citation.] Each of the victims, who had consented to a pathological examination, with its concomitant manual and instrumental intrusions, was 'unconscious of the *nature* of the act' of sexual intercourse committed upon her by defendant, until the same was accomplished, and cannot be said to have consented thereto." (*Ogunmola*, *supra*, 193 Cal.App.3d at pp. 280-281, italics in original.)[10]

In *People v. Howard*, *supra*, 117 Cal.App.3d 53, the court rejected a defendant's argument that "unconsciousness must be total, i.e., a total unawareness that the physical act is being performed." (*Id*. at p. 55.)

> "This is not what the [code] section says and [*Minkowski*] … says no such thing. [¶] *Minkowski* ... says that this element of the crime is 'that the victim was at the time unconscious of the nature of the act.' While it is true that the victims in *Minkowski* may have been totally unaware of what was happening …, the test *Minkowski* used was that of the code section – unconscious of the nature of the act." (*Ibid.*)

Howard further held: "We do not accept the principle that the victim must be totally unconscious. If the Legislature had meant this to be the law, it could easily have said so – 'when the victim is unconscious.' We presume the Legislature meant what it said when it added – 'of the nature of the act.' " (*Id.* at p. 55.)

In *Hernandez, supra*, 200 Cal.App.4th 1000, defendant was convicted of rape of an unconscious person. The offense occurred when the victim and defendant spent an evening at a mutual friend's house. They played video games and drank beer, and she later fell asleep in bed. She woke up around 4:00 a.m. and noticed her genital area was wet, she was not wearing underwear, and her pajama bottoms were on her body but

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10 *Minkowski* and *Ogunmola* involved defendants who were physicians, and whose conduct could have conceivably been within section 261, subdivision (a)(4)(D)'s "professional purpose" definition of unconsciousness. However, those cases were decided before section 261, subdivision (a)(4)(D) was amended in 2002 to add the "professional purpose" definition. (*People v. Bautista* (2008) 163 Cal.App.4th 762, 773; *Pham, supra,* 180 Cal.App.4th at p. 925.)

inside out. She found defendant sleeping in another room, woke him up, and asked if he had done anything to her. Defendant denied it. The victim's family later took her to a hospital for a sexual assault examination. A forensic nurse testified the victim had lacerations on her vagina consistent with blunt penetrating trauma. After DNA tests implicated defendant, he admitted to the police that he had sex with the victim, but claimed it was consensual. Upon further questioning, he admitted the victim was knocked out and asleep when he had sex with her. (*Id.* at pp. 1002-1003.)

Hernandez rejected defendant's argument that his conviction was not supported by substantial evidence simply because the victim was "drunk" rather than "unconscious." (*Hernandez, supra*, 200 Cal.App.4th at p. 1005.)

> "[T]he record contains substantial evidence supporting the inferences drawn by the jury: that [the victim] was unconscious and that [defendant] knew it. In his tape-recorded interview with [a police officer], [defendant] admitted that [the victim] was unconscious when he had sex with her. *According to [defendant], [the victim] never told him she wanted to have sex; in fact, she said nothing during the entire encounter. She did not 'wake up' and barely even moved while they were having sex. In fact, [defendant] agreed that she was 'knocked out' or 'out cold' while they were having sex.* [Defendant] also admitted that [the victim] never gave him permission to have sex with her and that he knew she 'didn't want to have sex with [him].' A rational trier of fact could find from these statements alone that [the victim] was unconscious during the assault and that [defendant] knew it." (*Id*. at p. 1005, italics added.)

In *People v. Lyu* (2012) 203 Cal.App.4th 1293 (*Lyu*), defendant was convicted of sexual penetration by a foreign objection on an unconscious person, oral copulation of an unconscious person, and sexual battery.[11] Defendant worked as a massage therapist, and inserted his fingers inside the vagina of a female client while massaging her legs. In

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[11] Both of the offenses addressed in *Lyu* – sexual penetration by a foreign object of an unconscious person (§ 289, subd. (d)) and oral copulation of an unconscious person (§ 288a, subd. (f)) – include the same four statutory definitions of unconsciousness as in section 261, subdivision (a)(4), rape of an unconscious person. (*Lyu, supra*, 203 Cal.App.4th at pp. 1299, 1300, fn. 9.)

reaction to defendant's conduct, the woman hit him and said no, and asked what he was doing. Defendant started to sexually assault her, but she resisted and left the room. After defendant was arrested, he admitted he sexually touched the woman but claimed she wanted sex from him. At trial, defendant testified that she asked him for sex. (*Id*. at p. 1295-1298.)

Lyu held there was insufficient evidence that the woman was "unconscious" pursuant to the statutory definitions when defendant performed the sexual acts.

> "For the purposes of both sections … [the woman] would have been unconscious at the time if she was 'not aware, knowing, perceiving or cognizant that the act occurred.' " (*Id*. at p. 1299.)

Lyu noted that the prosecution argued that the woman was unconscious because she was on her stomach when defendant sexually assaulted her, and she was unaware and did not expect him to sexually assault her. (*Lyu, supra*, 203 Cal.App.4th at p. 1299.) *Lyu* rejected the prosecution's unconsciousness argument because the woman was "instantly aware" that defendant was committing a sexual assault. (*Id*. at p. 1301.)

> "[The woman] testified that she was lying face down when [defendant], without warning, inserted one or two fingers into her vagina, and she hit at him and said, 'no.' She also testified that when she then turned over onto her back, [defendant] abruptly put his mouth on her vagina. There is not substantial evidence to support a conviction under sections 289, subdivision (d)(2) and 288a, subdivision (f)(2). The facts of this particular case do not meet the conditions set forth in section 289, subdivision (d)(2) for a determination of '"unconscious[ness] of the nature of the act." ' *She instantly knew, perceived, and was cognizant that the act occurred. The instant [defendant] penetrated her with his finger, she protested, clearly aware of the nature of the act, as her striking [defendant] and saying no demonstrates*.… (*Lyu, supra*, 203 Cal.App.4th at p. 1301.)

Lyu also rejected the prosecution's argument to construe the statutory definition of unconsciousness to mean that "the victim 'did not see the attack coming and was not aware or cognizant of it until it had occurred.' " (*Lyu, supra*, 203 Cal.App.4th at p. 1299.)

> "[The statutory definitions] make no reference to whether a victim sees an attack coming; and further, nothing in the language of the statute suggests that we should imply in statute the words 'until it had occurred' such that sections 289, subdivision (d)(2) and 288a, subdivision (f)(2) would read: 'Was not aware, knowing, perceiving, or cognizant that the act occurred [until it had occurred].' Absent some indication from the Legislature that it intended the duration of the synaptic process that transpires virtually instantaneously when one is touched to constitute an absence of awareness, knowledge, perception, or cognizance that an act 'occurred' – a concept that is generally inconsistent with the plain usage of those words because all awareness, knowledge, perception, or cognizance of external stimuli must stem from some synaptic process – we will not add that meaning to the clear and unambiguous language of the statutes. 'The first principle of statutory interpretation requires that we turn initially to the words of the statute to ascertain the Legislature's intent. [W]e see no reason to expand the meaning of the plain language of the statute. Thus, [the woman] was 'aware, knowing, perceiving, or cognizant that the act[s] occurred.' [Citations.]" (*Lyu, supra*, 203 Cal.App.4th at pp. 1301-1302.)

Lyu thus reversed defendant's convictions because of insufficient evidence of unconsciousness.[12]

In *Stuedemann, supra*, 156 Cal.App.4th 1, the court extensively addressed the definition of unconsciousness based on fraud in fact. The defendant was convicted of rape by a foreign object on an unconscious person (§ 289, subd. (d)(3)), and oral copulation on an unconscious person (§ 288a, subd. (f)(3)). Both offenses contain the same four statutory definitions of unconsciousness as rape of an unconscious person, including fraud in fact. (*Stuedemann, supra*, 156 Cal.App.4th at p. 4.) The convictions were based on an incident when a woman made an appointment with defendant for a massage at his place of business. When he began the massage, he never said that he was going to perform any sexual acts. During the massage, defendant placed his finger into

[12] *Lyu* further noted that the facts of that case did not involved unconsciousness based on the statutory definition of "fraud in fact." (*Lyu, supra*, 203 Cal.App.4th at p. 1302, fn. 10.)

her vagina and then orally copulated her. She immediately told him to stop. Defendant apologized and left the room. (*Stuedemann, supra*, 156 Cal.App.4th at pp. 4-5.)

Stuedemann noted that while both statutes contained four definitions of unconsciousness, the prosecution theory was limited to the argument that the woman was unconscious because of the defendant's fraud in fact. (*Stuedemann, supra,* 156 Cal.App.4th at p. 6.) *Stuedemann* extensively reviewed cases which had defined fraud in fact, as compared with fraud in the inducement:

> "[T]he concept of fraud in fact appears limited to those narrow situations in which the victim consented to the defendant's act but, because the victim believed the essential characteristics of the act consented to were different from the characteristics of the act the defendant actually committed, the victim was incapable of resisting the act actually committed because the victim was ignorant (or 'unconscious') of the true nature of the act permitted.… [¶] *In contrast, when the victim consents to the defendant's act with full knowledge of the essential characteristics of the act, a conviction under the unconscious-due-to-fraud-in-fact concept cannot stand even though the victim was induced to consent by fraudulent representations as to the benefits resulting from the act*." (*Stuedemann, supra,* 156 Cal.App.4th at p. 7, italics added.)

Stuedemann concluded that defendant's convictions were not supported by substantial evidence because his conduct did not amount to fraud in fact. (*Stuedemann, supra,* 156 Cal.App.4th at pp. 6-8.)

> "[T]he evidence does not support a conviction under the unconsciousness provisions of sections 288a, subdivision (f)(3) or 289, subdivision (d)(3) [of fraud in fact]. There is no evidence [the woman] consented or cooperated (was 'incapable of resisting') because of her ignorance of the true nature of the acts performed by [defendant]. *To the contrary, she did not permit [defendant] to orally copulate or digitally penetrate her believing the copulation or penetration was something other than a sexual copulation or penetration; instead, she immediately recognized the acts for what they were and expressed her nonconsent*." (*Stuedemann, supra,* 156 Cal.App.4th at p. 8, italics added.)

Stuedemann rejected the People's argument that *Minkowski* and *Ogunmola* supported the conviction, and found those cases factually distinguishable:

> "Unlike *Ogunmola* and its predecessors, there was no evidence [the woman] consented to anything resembling the acts undertaken by [the defendant]. Although [the woman] consented to a massage, the result of which made her vulnerable to [the defendant's] acts that overstepped the boundaries of her consent, *the evidence showed she was fully aware of the nature of [the defendant's] acts when those acts transgressed the boundaries and was capable of (and did) express her nonconsent and resistance to the conduct*. We conclude that [the defendant's] 'conduct, reprehensible though it was, did not violate [sections 288a, subdivision (f)(3) or 289, subdivision (d)(3) because [the woman] was not unconscious due to [the defendant's] fraud in fact, the only theory asserted by the prosecution.] If there is a statutory oversight in this area of the penal law, the Legislature may address it.' [Citation.]" (*Stuedemann, supra,* 156 Cal.App.4th at p. 9, italics added.)

D. <u>Analysis</u>

We are thus presented with the question as to whether there is substantial evidence to support defendant's conviction for count III, rape of an unconscious person, based on the four statutory definitions of unconsciousness.

We begin with the fourth definition of unconsciousness contained in section 261, subdivision (a)(4)(D), that the victim was "not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's *fraudulent representation that the sexual penetration served a professional purpose* when it served no professional purpose." (§ 261, subd. (a)(4)(D), italics added.) While the jury was instructed on this definition, it is clearly inapplicable to the facts of this case since defendant and the victim were not brought together by any purported type of professional relationship.

We next turn to the definition of unconsciousness contained in section 261, subdivision (a)(4)(A): that the victim was "unconscious or asleep." At trial, the prosecutor asserted in closing argument that defendant raped S.N. when she was asleep and could not resist; she was not aware the sexual act was occurring; she woke up as he continued the sexual act; and she was, thus, asleep or unconscious and unaware of the nature of the sexual act. Defense counsel countered that defendant was not guilty because S.N. "*wasn't unconscious. She really wasn't even asleep. She was aware before*

[defendant] was. That's how the facts and the evidence came out during the trial." (Italics added.) In rebuttal, the prosecutor argued defendant was guilty of count III because "*[s]he was unconscious, which means she was sleeping as it's happening and she's waking up*." (Italics added.) On appeal, the People similarly argue that S.N. was asleep and unconscious when defendant began to rape her; that conduct constituted a violation of section 261, subdivision (a)(4) because any sexual penetration, however slight, is sufficient to complete the crime; and the fact that she woke up while he was still raping her did not preclude the jury from finding defendant guilty of count III.

However, we find there is insufficient evidence to support defendant's conviction for count III based on the definition of unconsciousness contained in section 261, subdivisions (a)(4)(A). S.N.'s undisputed testimony establishes that she was not "unconscious or asleep" either before or during the act of sexual penetration. (*Ibid*.) In contrast to the facts of *Hernandez*, there is no evidence that S.N. was " 'knocked out' " or " 'out cold' " immediately before or during the act of sexual penetration. (*Hernandez, supra*, 200 Cal.App.4th at p. 1005.) S.N. testified that she woke up when she felt someone place a hand on her hand. She testified that she then felt her hand placed on a man's penis, the man moved her hand up and down on it, and she believed he wanted to have sex with her. She further testified that she felt the man's penis pushed into her vaginal area. S.N. was thus not "unconscious or asleep" at the time of sexual penetration.

S.N.'s undisputed testimony also demonstrates there is insufficient evidence to support the statutory definition of unconsciousness contained in section 261, subdivision (a)(4)(B), that she was "not aware, knowing, perceiving, or cognizant that the act occurred." (*Ibid*.) S.N. never testified that she was not sure what was going on, that she didn't know what she was touching, or what was touching her. S.N. never testified that it was only later on that she realized that she had been touching a man's penis or that a man's penis was being pushed into her vaginal area. Instead, she testified that she knew exactly what was going on as it happened.

In contrast to the victims in *Minkowski*, *Howard,* and *Ogunmola*, there is no evidence S.N. was unconscious or unaware that a man was performing an act of sexual penetration as that act occurred, or that S.N. woke up while the act was being performed. Instead, S.N. testified that she woke up as defendant placed his hand on her hand and then guided her hand in a manner which led her to believe that her husband wanted her to engage in foreplay so they could have sex. In *Minkowski* and *Ogunmola*, the victims perceived that the defendants were touching their bodies, but they did not realize that they were being touched sexually at the time the sexual acts occurred. In *Hernandez*, the victim was completely asleep, unconscious, and unaware that a man had touched her in a sexual manner until she woke up, and then realized that her genital area was wet; a sexual assault examination revealed lacerations on her vagina, and defendant's saliva and sperm on her body. (*Hernandez, supra*, 200 Cal.App.4th at pp. 1002-1003.)

In contrast, the entirety of S.N.'s testimony demonstrated that she was awake, conscious, and aware that a man was performing a sexual act on her body at the time that the act was occurring, that she was aware "of the 'essential characteristics of the act,' i.e., *the sexual nature of the act itself* …. " (*Pham, supra*, 180 Cal.App.4th at p. 928, italics added; *People v. Howard*, *supra*, 117 Cal.App.3d 53, 56.) In addition, there is no evidence that defendant engaged in any sexual act, or sexually penetrated S.N., before she was awake and conscious of what was going on. S.N.'s undisputed account is very similar to the evidence introduced in *Lyu,* where the woman knew exactly what was going on as it happened, which was found insufficient to support the conviction in that case. (*Lyu, supra,* 203 Cal.App.4th at pp. 1301-1302.)

S.N. testified that after defendant left the bedroom, she discovered her underwear and sleep shorts were not on her body, and found the clothing on the floor, at the foot of the bed. Unlike the victim in *Hernandez*, however, S.N. never had a sexual assault examination. She did not describe any bodily fluids on her body, she did not testify that

her genital area had been injured in any way, and her clothing was not seized and examined for physical evidence.

The People assert that S.N. "may have woken up" while defendant raped her. The People further assert the evidence supports the inference that defendant sexually penetrated her before she was aware and conscious that a sexual act was being performed on her body. However, there is no evidence that defendant performed an act of sexual penetration *before* S.N. woke up and felt a man's hand on her hand, and then felt that hand guiding her hand on his penis. The People's argument might carry some weight if supported by the evidence. For example, in *People v. Holt, supra*, 15 Cal.4th 619, defendant was convicted of raping and murdering the victim. The California Supreme Court affirmed defendant's rape conviction without forensic evidence or any eyewitness testimony. (*Id.* at pp. 638-639.) Semen was found on the victim's clothing, but laboratory analysis found no traumatic evidence of penetration and no semen in or on the victim's body. (*Id.* at p. 668.) An emergency room physician who examined the victim testified that her vaginal area was red, which could have been consistent with infection, or bruising and sexual penetration. (*Ibid.*) The physician found no other evidence of infection. (*Ibid.*) Defendant argued this evidence did not support the element of sexual penetration. (*Ibid.*)

Holt held there was substantial circumstantial evidence of sexual penetration: "That the evidence might lead to a different verdict does not warrant a conclusion that the evidence supporting the verdict is insubstantial. [Citation.] The evidence of penetration in this case was circumstantial – redness in the vaginal area, the absence of evidence of an infection that might account for it, and expert testimony that the redness was consistent with penetration. Other circumstantial evidence ... could support an inference that the redness had a different cause." (*Holt, supra,* 15 Cal.4th at p. 669.) *Holt* explained that when a trier of fact relies on inferences, "those inferences must be reasonable. An inference is not reasonable if it is based only on speculation. [Citation.]"

(*Ibid.*) *Holt* held the inference apparently drawn by the jury in that case – that defendant accomplished sexual penetration – was reasonable because it was based on evidence that the redness in the victim's vagina was consistent with sexual penetration, and the defendant's admission he sexually assaulted the victim. (*Ibid.*)

In contrast to *Holt*, there was no evidence in this case which would have supported a reasonable inference that defendant engaged in any sexual touching or sexual penetration prior to the time when S.N. woke up and felt defendant's hand on her hand. S.N. did not describe any pain or redness on her body, that she discovered any bodily fluids on her body, or that she discovered similar evidence on the clothing which she found on the floor. S.N.'s clothing was never examined and there was no forensic evidence recovered in this case.

Finally, we find that there is no evidence to support count III based on the fraud in fact definition of unconsciousness, as set forth in section 261, subdivision (a)(4)(C). As in *Stuedemann*, S.N. was not unconscious because she was fully aware of the nature of defendant's sexual acts and, given that awareness, she did not express her nonconsent. While defendant's conduct may have been "reprehensible," it did not amount to unconciousness based on fraud in fact, as that term has been defined. (See, e.g., *Stuedemann, supra*, 156 Cal.App.4th at p. 9.)[13]

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[13] If defendant had been charged and convicted of rape in violation of section 261, subdivision (a)(5), the result in this case may have been different. That section defines rape as an act of sexual intercourse which occurs "[w]here a person submits under the belief that the person committing the act is the victim's spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief."

In *People v. Leal* (2009) 180 Cal.App.4th 782, the court held there was substantial evidence to support defendant's conviction for violating section 261, subdivision (a)(5), when defendant broke into victim's house, got into bed with the victim and her husband, sexually assaulted the victim, and the victim did not resist because she thought defendant was her husband. (*Id.* at pp. 786, 788-790.) "[T]he jury could conclude that a woman in [the victim's] position would reasonably believe these acts were being committed by her

We thus conclude that given S.N.'s undisputed testimony that she knew a man was trying and did commit an act of sexual penetration, there was no evidence from which a rational trier of fact could draw the inference that S.N. was unconscious as defined by section 261, subdivisions (a)(4)(A)-(a)(4)(D).

The lesser included offense

Given our conclusion that the evidence at trial was insufficient as a matter of law to support defendant's conviction for count III, rape of an unconscious person, he cannot be retried for that offense. (*Burks v. United States* (1978) 437 U.S. 1, 18; *People v. Hatch* (2000) 22 Cal.4th 260, 271-272.)

However, "an appellate court may reduce a conviction to a lesser included offense if the evidence supports the lesser included offense but not the charged offense. [Citations.]" (*Stuedemann, supra*, 156 Cal.App.4th at p. 9, fn. 6.) The jury herein was instructed that attempted rape of an unconscious person was a lesser included offense of count III. The record could support the conclusion that there would be substantial evidence to support an attempt conviction in this case given defendant's conduct – he entered the house, undressed, went into the bedroom, got into bed next to S.N. and removed her shorts and underwear while she was still asleep, but she woke when he touched her hand and before he began the act of sexual penetration.[14] "Under such

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husband. The jury could also infer that [defendant] intended for [the victim] to believe that he was the man sleeping next to her in bed, and that he would have had reason to believe that man was her husband. [Defendant's] claim that it would also have been reasonable for him to believe [the husband] was merely [the victim's] boyfriend ignores the applicable standard of review. [Defendant] also notes that he never actually said anything to [the victim]. Under the circumstances, however, his silence spoke volumes. [Citations.]" (*Leal, supra*, 180 Cal.App.4th at pp. 789-790)

[14] While we have reversed count III, rape of an unconscious person, for insufficient evidence, that conclusion does not mean that counts I and II are not supported by substantial evidence. Aside from the prejudicial instructional errors which have required reversal of counts I and II, the same factual analysis which could have supported the lesser included offense for count III, attempted rape of an unconscious person, might

circumstances, we ' "may reduce the conviction to a lesser degree and affirm the judgment as modified, thereby obviating the necessity for a retrial. [Citations.]" [Citation.]' [Citation.]" (*Stuedemann, supra,* 156 Cal.App.4th at p. 9, fn. 6.)

In this case, however, the court committed the same instructional errors for the lesser included offense that require us to reverse counts I and II, as explained in issue I, *ante*. The court instructed the jury that attempted rape of an unconscious person was a lesser included offense of count III, the lesser included offense was a specific intent crime, voluntary intoxication could have prevented defendant from forming that specific intent, rape of an unconscious person was an element of the lesser included offense, and voluntary intoxication was never a defense to rape of an unconscious woman.

Thus, while the lesser included offense of attempted rape of an unconscious person could have been supported by substantial evidence, we decline to reduce count III to that lesser included offense because of the same prejudicial instructional errors that plagued counts I and II. (Cf. *People v. Bailey* (July 12, 2012, S187020) ___ Cal.4th ___.)[15]

DISPOSITION

Defendant's convictions in counts I, II, and III are reversed. As explained *ante*, defendant cannot be retried for count III, rape of an unconscious person. The matter is remanded for further appropriate proceedings as to counts I and II, and any lesser included offenses for count III.

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seem consistent with finding substantial evidence to support count I, assault with intent to commit rape during a residential burglary, and count II, burglary with intent to commit rape, because counts I and II are based on a defendant's specific intent to commit those offenses and are not dependent on a *completed* act of rape.

[15] Given our decision to reverse counts I, II, and III, we need not reach defendant's remaining issues as to the application of section 654 to his sentence, and whether the life term imposed for count I violated the Eighth Amendment.

_____
Poochigian, J.

WE CONCUR:

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Hill, P.J.

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Detjen, J.